

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

**BRIEF FOR APPELLANT
AND APPENDIX**

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

No. 8831 FILED OCT 16 1944

CLARA I. MAYS, ET AL.,

v.

WILLIAM T. BURGESS, FRANCES E. BURGESS,
H. P. GUMBRECHT, AGNES B. MULARKEY,
MARY C. CARLETON, *Appellees*,

and

JANE COOK, Consolidated Properties, Inc., *Appellants*,

v.

WILLIAM T. BURGESS, FRANCES E. BURGESS,
H. P. GUMBRECHT, AGNES B. MULARKEY,
MARY C. CARLETON, *Appellees*.

**Appeals from the District Court of the United States for the
District of Columbia.**

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IN THE

United States Court of Appeals

DISTRICT OF COLUMBIA.

APRIL TERM, 1944

No. 8831

CLARA I. MAYS,
CONSOLIDATED PROPERTIES, INC., *Appellants*

v.

WILLIAM T. BURGESS, FRANCIS E. BURGESS,
H. P. GRUMBRECHT, AGNES B. B. MULARKEY,
MARY C. CARLETON, *Appellees*.

Appeal from the United States District Court
For The District of Columbia.

BRIEF FOR APPELLANTS.

JURISDICTIONAL STATEMENT.

Clara I. Mays and Consolidated Properties, Inc., appeal from a judgment against them in favor of plaintiff below (appellees here), entered in the District Court of the United States for the District of Columbia in cause No. 23436 on June 30, 1944, by the United States District Court for the District of Columbia after trial without a jury, perma-

nently enjoining Clara I. Mays, a Negro, from owning or occupying premises known as 2213 First Street, N. W., and permanently enjoining the Consolidated Properties, Inc., from selling or transferring said property to the appellant Mays, and from allowing the same to be used or occupied by any person of the Negro race or blood, and cancelling the instrument of conveyance which purported to put title to the said property in the said appellant Mays, and order the said Clara I. Mays to remove herself and all her personal effects from the said land and premises within sixty days from the said judgment.

The District Court had jurisdiction under the D. C. Code, 1940, Title 11, Section 101, and U. S. Code, Title 28, Section 225.

STATEMENT OF THE CASE.

Appellant Clara I. Mays is a person of the Negro race and blood and the appellant Consolidated Properties, Inc., is a corporation engaged in the acquisition and transfer of real property within the District of Columbia.

As of, to wit, February 17, 1944, by deed dated February 15, 1944, and recorded as instrument No. 4587, Jane Cook, admittedly a straw person who herself acquired title from the Consolidated Properties, Inc., conveyed to Clara I. Mays property known as Lot 31 in Square 3123, with improvements thereon known as premises 2213 First Street, Northwest, and as, to wit, February 21, 1944, the appellant Clara I. Mays moved into and occupied, together with her family, and continues to occupy, the property in question which was vacant at the time of purchase, the persons actually occupying the said premises being the appellant Mays, her three sisters and four nieces, the nieces being of school age and in school in the District of Columbia, and the adults all being employees, working in the District of Columbia (App. 32). The record and evidence disclosed that on or about September 1, 1925, all of the then fee simple owners of property on the east and west sides of First

Street between W and Adams Streets, Northwest, joined in the execution of an agreement, the pertinent paragraphs of which are:

"Whereas the said parties hereto are all owners of real estate situated in the District of Columbia, and located on First Street between W and Adams Streets, Northwest, both on the ~~East and West sides of said street~~, said property being parts of squares 3122 and 3123, as recorded in the Surveyor's Office of the District of Columbia; and

"Whereas the said parties hereto desire, for their mutual benefit, as well as for the best interests of the said community and neighborhood, to improve in any legitimate way and further the interests of said community and neighborhood;

"Now, Therefore, in consideration of the premises and the sum of five dollars each to the other in hand paid, the parties hereto do hereby mutually agree, promise and covenant, each with the other and for their respective heirs and assigns, that no part of the land now owned by the parties hereto, a more definite description of said property being given after the respective signatures hereto, shall ever be used or occupied by, or sold, conveyed, leased, rented or given to Negroes or any person or persons of the Negro race or blood. This covenant shall run with the land and bind the respective parties hereto, their heirs and assigns, for the period of twenty-one years from and after the date of these presents;" (App. 3, 4).

and that said agreement was duly recorded among the land records of the District of Columbia on, to wit, October 6, 1925, in Liber 5584, folio 377 et seq.

The testimony revealed that prior to the purchase of this property by Clara I. Mays she and her sisters and nieces were renting, and that the property occupied by them had been sold and under a Court Order that they were evicted, necessitating the storage of their furniture and that she and her family roomed at different places until the purchase of this particular home, which was vacant at

the time. Appellant further testified that at the time of purchase she conferred with counsel who advised that owing to the change in neighborhood, as he conceived it, and the relatively short duration of the covenant in the block in which she was purchasing (to wit, two years), and the rather imminent duration of the covenant in ~~the adjoining block (to wit, November 1, 1944),~~ that she was not running any risk in purchasing and occupying said property. The evidence disclosed, as adduced from the plaintiff and a witness Murphy, who identified himself as Executive Secretary of a certain association where the property here in question was located, himself living at 42 Rhode Island Avenue, Northwest, out of the area of this covenant, and who testified that he was instrumental in obtaining the signatures of the property owners to the restrictive agreement to the area here involved.

The witness Murphy testified to the fact that the record disclosed that the covenant in the 2100 Block of First Street expired on November 1, 1944, ~~and that two of the properties, namely 2118 and 2121 First Street, were then owned by colored but that suits were then pending protesting against such ownership.~~ (These suits are presently pending in the District Court of the United States for the District of Columbia.)

The witnesses for the plaintiff, three in number, William T. Burgess, H. P. Grumbrecht and Mable Marsili, respectively testified they were property owners in the block and had, among other things, relied upon the restrictive agreement in the purchase of their property. The witness Marsili testified she paid \$9,500.00 for the property purchased by her husband and herself (App. 34). The witness Murphy, having testified to an area including both sides of First Street east to Lincoln Road and south to Rhode Island Avenue as being entirely occupied by persons of the white race, testified further on cross-examination that west of First Street on "U" Street there were three or four houses on both sides of the streets which were

originally covered by covenants and occupied by whites, but are now occupied by Negroes, which said occupancy had been given over to Negroes without protest and without the attempted urging of the covenant.

On behalf of the appellants one Mr. Stathes, Secretary-Treasurer of the appellant Consolidated Properties, Inc., testified that the Consolidated Properties, Inc., had bought several properties in this immediate area, among which was the particular property here in question; that the value of the property in the immediate locality and the particular property was much greater for prospective sale to colored than to whites, indicating that there were very few white prospects obtainable, and that the highest figure which he had been offered for comparable property from whites within the area was \$7,500.00 as distinguished from the \$9,950.00 which represented the sale price to the appellant Mays. This witness further testified the block in question was largely composed of rooming houses and apartment houses, and was occupied only to a relatively small degree by owners living in the property for family purposes alone. This witness further testified that the property was vacant and had been for a good period of time at the time of the sale to defendant Mays (App. 31).

A further witness produced on behalf of the appellants was one Abraham Draisner, a white real estate dealer in the District of Columbia, who indicated he had had approximately eight years experience, a part of which had been covered while in the government service, he being only out of the government service for approximately one year, who corroborated the witness Stathes in his statement that white purchasers were scarcely obtainable in this area and that the difference in value in his opinion between white prospective purchasers and colored was the differential of approximately between \$7,000.00 and \$10,000.00.

Further on behalf of the appellants appeared one Mrs. Geneva Valentine, a colored real estate broker in the Dis-

trict of Columbia, who stated her clientele to be white and colored, and identified herself also as the agent in the sale of the property here in question, and stated that aside from the sale of the property here involved she had two other properties in the 2100 block of First Street for sale, and that the covenant in that block expired on November 1, 1944, and that it was anticipated that colored occupancy would be realized in these two pieces of property as of, to wit, November 1, 1944. She further testified that there were other property owners in the area here involved owning property covered by this same covenant who were desirous of selling to colored, and had approached her to this effect, and upon a ruling made by the Court, after indicating she "did not desire to give the names of persons involved, gave the name of an individual living in the same block who had approached her in this connection (App. 32). Witness further testified that the property sold to Clara I. Mays was unoccupied at the time of the sale.

CONSTITUTION AND STATUTES INVOLVED.

Appellants rely, among other things, on the due process clauses of the 5th and 14th Amendments and Section 1 of the 13th Amendment to the Constitution of the United States and the Statutes enacted thereunder; U. S. Code, Title 8, Section 41 and 42 (U. S. Revised Statutes 1977) and U. S. Revised Statutes 1978; Article 4, Section 2, U. S. Constitution; U. S. Revised Statutes 5508.

STATEMENT OF POINTS.

1. The Court erred in holding that the restrictive agreement was enforceable against the appellants and that injunctive relief was allowable against both appellants.

2. The Court erred in failing to hold that the restrictive agreement was not void as violating the rights of the appellants as being against public policy; as depriving the appellants of property without due process of law; as de-

nying the appellants the equal protection of the law; and as abridging the privileges and immunities of citizens of the United States, including appellants.

3. The Court erred in not holding that the said restrictive agreement is void in that it is forbidden by the Constitution of the United States and especially Article 4, Section 2 thereof, the 5th, 13th and 14th Amendments thereof, and the laws enacted in aid and in sanction of the said 5th, 13th and 14th Amendments, including especially Revised Statutes 1977 and 1978 and 5508.

SUMMARY OF THE ARGUMENT.

1. The Court erred in failing to hold that the restrictive agreement was ineffective by reason of the failure of the original purpose thereof in that the character of the neighborhood had materially changed, rendering the original purpose unenforceable.

2. The Court erred in failing to take into consideration as rendering impractical injunctive relief in view of the circumstances surrounding the expiration of the restrictive agreements in this area and immediate adjoining areas.

2-A. The original covenant did not meet the technical requirements necessary to make same binding and effective.

3. The covenant in this case constitutes undue and unlawful restraint on alienation, particularly in that it is universal as being against all persons of color and that although purporting to run for a limited period, within its phraseology is perpetual and constitutes a continuing cloud upon the property involved.

4. The Court erred in not holding that the restrictive agreement is contrary to public policy, violative of the Constitution of the United States and the Statutes enacted thereunder.

5. The Court erred in not holding that the Equity Court is without right to enforce an agreement, the very entering into of which is in derogation of Article 4, Section 2 of the Constitution of the United States and the legislation enacted in support thereof.

ARGUMENT.

1. The Court erred in failing to hold that the restrictive agreement was ineffective by reason of the failure of the original purpose thereof in that the character of the neighborhood had materially changed, rendering the original purpose unenforceable.

The completed text of this Brief will evidence the position of the appellants, that the restrictive agreement relied upon is unlawful and unenforceable for reasons set forth in detail. At the outset, however, it is important to note that there was substantial testimony in the case indicating that the neighborhood had changed from what was apparently a residential section of owner-occupied property to an area largely composed of rooming houses and apartment houses and occupied to a relatively small extent by persons living in their own property for family purposes alone (App. 30-33).

The argument cannot be refuted that the government itself could not by any Statute or Enactment accomplish an exclusion of occupancy of real estate by Negroes such as is undertaken and allowed in this case by the restrictive agreement (Buchanan v. Warley, 245 U. S. 60, 62nd L. Ed. 149), and the only theory upon which such a purpose can be accomplished by a group of individuals is on the purported ground that this is a contractual right which persons are allowed to enter into and which is enforceable among the parties signatory, made binding upon successors in title and running with the land.

The original purpose, therefore, of the parties to the agreement is of paramount importance and the Courts will not undertake to grant injunctive relief where the injunc-

tion is futile because the objects of the covenant cannot be obtained. What were the objects of this agreement? It is apparent that the original signers, all owners of property in this immediate neighborhood, desired that this community should be kept residential in character and that Negro ownership and occupancy should be excluded in order that the said owners of the property might enjoy premises owned by them free from the presence of Negroes. It is for that reason, without doubt, that the agreement begins with the recital that the parties are "all owners of real estate situated in the District of Columbia and located on First Street between W and Adams Streets both on the east and west sides of said Street" (App. 3).

It is further to be noted that the suggested reason for the agreement is, as indicated by the agreement, that the parties thereto desire—"for their mutual benefit as well as for the best interests of the said community and neighborhood to improve in any legitimate way and further the interests of said community and neighborhood." (App. 3, 4). This agreement did not contemplate that the white occupants would be preponderantly not owners of the property, but renters or lessees of rooming houses or apartment houses, to whom the so-called sanctity of the community could have no proprietary interest. The Court has a right to examine into not only the situation as to the exclusion of Negroes from ownership and occupancy at which the restrictive agreement aims, but also as to the personnel of the neighborhood and the nature of the housing in that vicinity before granting an injunction, which is without moment or purported effect against any except a few owner-occupants remaining in the neighborhood. The Court will not grant an injunction if the object of the covenant cannot be obtained. *Letteau v. Ellis*, 10 P. 2nd, 496 (Court of Appeals, Calif. 1932).

It is further to be considered in this matter of change of neighborhood that the original signers must have had in mind not only the real property between W and Adams

Streets on both sides of First Street, for with apparent design the suggested agreement is "for the best interest of the *community and neighborhood*" (italics ours), and the conceded proposition that west of First Street on "U" Street there were three or four houses on both sides of the Street which were covered by covenants but which had been given over to colored occupancy without protest and which were at present occupied by colored occupants (App. 30) was only indicative of the undisputable fact that the immediate surrounding neighborhood not only was changing to colored, but that it was so predominantly colored that apparent inroads on the restrictive territory were made the basis of no protest.

It is likewise of importance that the properties on Adams and Bryant Streets west of First Street are only three-fourths protected by land covenants, restricting occupancy by Negroes. This situation is rendered doubly important in view of the periods of duration of the restrictive agreements controlling this immediate area because the history as to the inability to secure white purchasers in the area and the approaching inroads from the west show without question the trend of ownership and occupancy by Negroes in the area here involved. It is natural that the Courts should recognize such a trend and should not lead injunctive relief which, by the surrounding conditions, must of necessity be temporary and fleeting, working hardship upon the appellants with no substantial show of relief to the appellees. Hundley v. Gorewitz, 77 App. D. C. 48.

2. The Court erred in failing to take into consideration as rendering impractical injunctive relief in view of the circumstances surrounding the expiration of the restrictive agreements in this area and immediate adjoining areas.

As has been noted, the property here involved is 2213 First Street, Northwest. A covenant in the 2100 Block of First Street likewise directing itself against Negro occupancy expires on November 1, 1944, and it is to be noted that anticipating the expiration of the restrictive agree-

ment, colored persons, significant of the trend hereinbefore referred to and driven by the force of necessity of securing decent housing, have already negotiated for the purchase of property in this adjoining block and the properties 2118 and 2121 First Street, Northwest, stand in the name of colored owners (App. 31), said properties being at the present time the subjects of pending litigation in the District Court. Here then, within a couple of months, in the adjoining block will be property available for Negro ownership and occupancy except for the contingency of the renewal or extension of the restrictive agreement. The lack of likelihood of such extension perhaps can best be emphasized by the statement that the appellant in this cause, Consolidated Properties, Inc., is made defendant in these said pending actions as the owner of the property which conveyed to the present Negro owners of record.

If there be any merit then in the pretended contention of the appellees, the threatening occupancy by Negroes of the adjoining block will soon be a realization for it cannot be reasonably contended that the Court of Equity would allow injunctive relief beyond the time limit placed within the terms of the restrictive agreement, nor is it conceivable to us that any Order could be entered into which would bind this question of Negro ownership and occupancy beyond the time limit of the said agreement except for, as indicated, the unlikely contingency of the renewal of said restrictive agreement.

If we may anticipate, as anticipate we certainly should, that Negro ownership and occupancy may be expected within an approximate month in the middle of the adjoining block on both sides of the street, will it not follow as a matter of course that either one of two things will happen—that (1) either the white neighbors in the 2100 block of First Street will arrange to and will dispose of their properties now no longer under the restrictions of any agreement, which will mean solid colored occupancy of this block, or (2) that the white ownership and occupancy in

the said block will continue with at least these two Negro families in their immediate midst, rendering ineffective and groundless any attempted continuance of the restrictive agreement by reason of its loss of purpose.

As previously indicated, it is the belief of these appellants that such covenants in and of themselves are not properly sustainable, but certain it is that where, as here, by reason of the change of neighborhood as to the type of white tenants and where, as here, the surrounding area from the west shows an unmistakable trend of colored ownership and occupancy, and where, as here, within the next immediate block on both sides of the street a covenant expiring as of November 1, 1944, has been anticipated by sale of white owners to colored, there can be no question but that injunctive relief should be denied because of the failure of purpose of the agreements relied upon. One essential matter for consideration in matters of this character is as to the value of properties in the immediate area. It is to be noted that the testimony in the instant case bears out the fact that the differential in value between white ownership and colored can be shown by the difference between \$7,500.00, a maximum offer by whites, and \$9,950.00, the sale price to the appellant Mays (App. 31). Supported likewise by additional testimony indicating the differential as being between \$7,500.00 as to prospective white purchasers as against \$10,000.00 for colored purchases, it, therefore, can in no sense be urged, and no word of testimony supports it, that there would be any depreciation in value by reason of colored ownership and occupancy, the testimony, as indicated, being directly to the contrary. See *Hundley v. Gorewitz, supra*.

(2-A) It is to be noted, and same was stipulated by counsel, that the wife of Francis H. Mellick departed this life on, to wit, September 19, 1925. The restrictive agreement, as before indicated, was dated September 1, 1925, and the acknowledgment of same taken as of September 25, 1925. However, in spite of the interest which the wife of the

said Mellick had in the property then owned by them, the name of the wife does not appear as one of the parties signatory to the said agreement. Such agreements, it is respectfully submitted, subjective as they are of proper alienation of property, and violative as they are of the rights of other citizens, should, we submit, be most strictly construed and where, as here, there was a lack of joinder of all the parties in interest, tending to bind the property here in question, there was no effective inclusion of this property in the restrictive agreement purported to be entered into. *McNeil v. Gray*, 40 App. D. C., 397.

(3) The covenant in this case constitutes undue and unlawful restraint on alienation, particularly in that it is universal as being against all persons of color and that although purporting to run for a limited period, within its phraseology is perpetual and constitutes a continuing cloud upon the property involved.

(4) The Court erred in not holding that the restrictive agreement is contrary to public policy, violative of the Constitution of the United States and the Statutes enacted thereunder.

In this connection the discussion of Points 3 and 4 are consolidated and Point 4 will be emphasized first in connection with Point 3.

Thus far this case has been discussed as falling within the outlines and decision of *Hundley, et ux v. Gorewitz, et al, supra*. The covenant, the enforcement of which has been decreed by the Court below, is contrary to public policy. At the onset let us say we are aware of the Court's decision in *Hundley v. Gorewitz*, in which it says—"But in view of the consistent adjudications in similar cases it must now be conceded that the settled law in this jurisdiction is that such covenants as this are valid and enforceable in equity by way of injunction." A long number of cases are cited in support of this statement. In the same Opinion, Mr. Justice Rutledge of this Court at the time the Opinion was rendered and now of the Supreme Court, observed—"I

concur in the result for the reason that if such a covenant as is involved in this case is valid in any circumstances, as to which I express no opinion, it is not valid or enforceable in the conditions shown on the present record and stated in the opinion of the court."

Notwithstanding this and other decisions, we are asking this Court to re-examine this question in the light of the present trends and in view of the basic decisions contra to these opinions. The Supreme Court of the United States has never settled this question. We are not unmindful of the fact that the Supreme Court of the United States had before it, in the case of *Corrigan v. Buckley*, 271 U. S. 332, 70 L. Ed. 969, a similar covenant before it, and that the point which is here urged was then called to the attention of that Honorable Court. That Court held it had no jurisdiction to review the case, the matter having been taken to the Supreme Court by an appeal from this Honorable Court and there being no application for a writ of certiorari. However, in the last paragraph of the Opinion of Mr. Justice Sanford (271 U. S. 332) we find the following expression indicating that the question here involved was regarded as open for serious consideration had it been properly brought before the Court:

"It results that, in the absence of any substantial constitutional or statutory question giving us jurisdiction of this appeal under the provisions of Section 250 of the Judicial Code, we cannot determine upon the merits the contentions earnestly pressed by the defendants in this court that the indenture is not only void because contrary to public policy, but is also of such a discriminatory character that a court of equity will not lend its aid by enforcing the specific performance of the covenant. These are questions involving a consideration of rules not expressed in any constitutional or statutory provision, but claimed to be a part of the common or general law in force in the District of Columbia; and, plainly, they may not be reviewed under this appeal unless jurisdiction of the case is otherwise acquired. Hence, without a consideration

of these questions, the appeal must be, and is dismissed for want of jurisdiction."

We are thus constrained again to bring to the attention of this Honorable Court the contentions here advanced, reminded as we are of the far-reaching effect of the problems involved and of the persons and property to be affected by the precedent created. To hold as valid a covenant such as that now under review would render it possible by the execution of additional similar covenants to exclude any Negro from becoming the owner of any part of the territory composing the District of Columbia. Is such a condition in conformity with sound public policy?

The public policy of this country is to be ascertained from the Constitution, Statutes and decisions and the underlying spirit illustrated by them. "Public policy" has been defined to be "that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, and against the public good." 3 Bouvier's Law Dictionary, 2765. The definition which the courts have frequently approved is the one given by Lord Brougham, 6 R. C. L. 707:

"Public policy is the principle which declares that no one can lawfully do that which has a tendency to be injurious to the public welfare."

Again:

"In substance, public policy may be generally said to be the community common sense and common conscience, extended and applied throughout the States to matters of public morals, public health, public safety, public welfare, and the like. It is that general and well settled public opinion relating to a man's plain palpable duty to his fellowman that has due regard to all circumstances of each particular situation."

Therefore, our public policy may be deduced from our constitutions and statutes, from judicial decisions and

from fundamental principles of right and wrong. Manifestly, when the constitution declares and defines certain public policies, such public policies must be paramount though a score of statutes conflict and a multitude of judicial decisions be to the contrary. *Kintz v. Harrigar*, 99 Ohio St. 240.

The sources from which public policy may be gathered are manifested "by public acts, legislative and judicial, and not by private opinion, however eminent", (*Giant Powder Co. v. R. R. Co.*, 42 Fed. 470) for "no general assembly is above the plain potential provisions of the Constitution, and no court, however sacred or powerful, has the right to declare any public policy that clearly contravenes or nullifies the rights declared in the Constitution. An act which the legislature is prohibited from doing or authorizing must, in its essence, necessarily be opposed to public policy, and so likewise (whatever the legislative branch of the Government inhibits) must be an offense against public policy. Section 1878 of the Revised Statutes reads as follows: "that all citizens of the United States shall have the same right in every State and Territory as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold and convey real and personal property." One would suppose that, if in the face of such a declaration a contract is entered into calculated to prevent the inheritance, purchase, lease, sale, holding and conveyance of real property by colored citizens of the United States in any State or Territory, such a contract is repugnant to our policy. It certainly was not intended that, if the white citizens of Washington agreed among themselves that they would not sell or lease any real property lying within the territorial limits of that city to a colored person, such an agreement would be enforceable as consonant with the controlling public policy.

And so when the Supreme Court has announced that legislation looking to the prevention of the acquisition of realty within a specified district by colored persons, is con-

trary to the Constitution and laws, it would seem to follow that a covenant between the white residents of that same district intended to prevent the acquisition of realty by colored persons, was contrary to our public policy. See *Buchanan v. Warley*, *supra*. In *Vidal v. Girard's Executors*, 2 How., 127, Mr. Justice Story pointed out that the policy of Pennsylvania on a particular subject was indicated by its Constitution and laws and judicial decisions. This view has been frequently adopted. See: *Hartford Fire Ins. Co. v. Chicago, M. & St. P. R. R. Co.*, 70 Fed. Rep. 201, 202; *Hollins v. Drew Theological Seminary*, 95 N. Y., 172; *Cross v. United States Trust Co.*, 131 N. Y., 344; *People v. Hawkins*, 157 N. Y., 12.

In *Messersmith v. American Fidelity Co.*, 232 N. Y., 161, 163, Judge Cardozo said: "The public policy of this State (New York) when the legislature acts is what the legislature says that it shall be."

Where would one be more likely to arrive at the sources from which our public policy is derivable than by exploring the Constitution and statutes of the United States and the adjudications of this Court? A student of our history like DeTocqueville, Bryce or von Holst would at once be struck by the inconsistency of the principle laid down in *Buchanan v. Warley*, with that expressed in the opinions rendered by this case and former cases of this character. It would appear to be obvious that, where a legislature is prohibited from sanctioning a particular policy, individuals may not enter into contracts in direct derogation of the same policy and call on the courts to enforce them. Surely that which a legislature cannot sanction should not be compelled to be done by a decree of a court of equity enforcing specific performance of an agreement between third parties, which is the equivalent of such legislation and is productive of identical results.

If such a contract as that involved in the present case is valid as affecting a limited area, it would be equally effective if it included an entire city, a county, or a State.

If the Constitution could be evaded as it is attempted to be by the device here employed, it would not be difficult to create a situation bearing the elements of a contract that would prevent a colored person from owning realty, or from taking up his habitation, in any State or in any part of a State.

The covenant is not only one which restricts the use and occupancy by Negroes of the various premises covered by its terms, but it also prevents the sale, conveyance, lease or gift of any such premises by any of the owners or their heirs or assigns to Negroes or to any person or persons of the Negro race or blood perpetually, or at least for a period of twenty-one years.

It Is in its Essential Nature a Contract in Restraint of Alienation and Is, Therefore, Contrary to Public Policy.

In the present case it is to be observed that the parties to the instrument sought to be enforced in this action have covenanted that no part of the land therein described owned by them "shall ever be used or occupied by or sold, conveyed, leased, rented, or given to Negroes or any person or persons of the Negro race or blood" (App. 3, 4). It binds the parties, their respective heirs and assigns, for all time. It is true that in the succeeding sentence it is declared that the covenant shall run with the land . . . for a period of twenty-one years from and after the date of these presents. That does not, however, cut down the covenant as between the parties so as to limit it to a period of twenty-one years. But whether the covenant be regarded as a perpetual covenant or as one running for twenty-one years only, it is equally opposed to public policy.

The subject of such restraints is learnedly discussed in *DePeyster v. Michael*, 6 N. Y., 497, by Chief Judge Ruggles. He points out that they were of feudal origin; creative of a violent and unnatural state of things, contrary to the nature and value of property and the inherent and universal love of independence; that they arose partly from favor

to the heir and partly from favor to the lord, "and the genius of the feudal system was originally so strong in favor of restraints upon alienation, that by a general ordinance, mentioned in the Book of Fiefs, the hand of him who wrote a deed of alienation was directed to be struck off" (p. 498). To deal with this tyranny the statute of Quia Emptores was enacted in 18 Edward I, which provided "that from henceforth it shall be lawful for any freeman to sell, at his own pleasure, his lands and tenements, or part of them, so that the feoffee shall hold the same lands and tenements of the chief lord of the same fee, by such service and customs as the feoffee held before."

As Chief Judge Ruggles says:

"The effect of this statute is obvious. By declaring that every freeman might sell his land, at his own pleasure, it removed the feudal restraint which prevented the tenant from selling his land, without the license of his grantor, who was his feudal lord. This was a restraint imposed by the feudal law, and was not created by express contract in the deed of conveyance; it was abolished by this clause in the statute. By changing the tenure from the immediate to the superior lord, it took away the reversion from the immediate lord; in other words, from the grantor, *and thus deprived him of the power of imposing the same restraint, by contract or condition expressed in the deed of conveyance.* The grantor's right to restrain alienation immediately ceased, when the statute put an end to the feudal relation between him and his grantee; and no instance of the exercise of that right, in England, since the statute was passed, has been shown, or can be found, except in the case of the king, whose tenure was not affected by the statute, and to whom, therefore, it did not apply." (*Italics ours.*)

In *Potter v. Couch*, 141 U. S., 296, 313, Mr. Justice Gray said:

"But the right of alienation is an inherent and inseparable quality of an estate in fee simple. In a de-

vise of land in fee simple, therefore, a condition against all alienation is void, because repugnant to the estate devised. Lit., Sec. 360; Co. Lit., 206b, 223a; 4 Kent Com., 131; *McDonogh v. Murdock*, 15 How., 367, 373, 412. For the same reason, a limitation over, in the case the first devisee shall alien, is equally void, whether the estate be legal or equitable. *Howard v. Carusi*, 109 U. S., 725; *Ware v. Cann*, 10 V. & C., 433; *Shaw v. Ford*, 7 Ch. D., 669; *In re Dugdale*, 38 Ch. D., 176; *Corbett v. Corbett*, 13 P. D., 136; *Steib v. Whitehead*, 111 Illinois, 247, 251; *Kelley v. Meins*, 135 Mass., 231, and cases there cited. And on principle, and according to the weight of authority (notwithstanding opposing dicta in *Cowell v. Springs Co.*, 100 U. S., 55, 57, and in other books), a restriction, whether by way of condition or of devise over, on any and all alienation, although for a limited time, of an estate in fee, is likewise void, as repugnant to the estate devised to the first taker, by depriving him during that time of the inherent power of alienation. *Roosevelt v. Thurman*, 1 Johns., Ch. 220; *Mandlebaum v. McDonell*, 29 Mich., 77; *Anderson v. Cary*, 36 Ohio St., 506; *Twitty v. Camp*, Phil. Eq. (No. Car.) 61; *In re Rosher*, 26 Ch. D., 801."

Especial attention is called to the exhaustive opinion in *Manierre v. Welling*, 32 R. I., 104, where many cases are cited and ably reviewed, and where one of the important conclusions reached in the case next to be cited was adopted:

"We are entirely satisfied there has never been a time since the statute *quia emptores* when a restriction in a conveyance of a vested estate in fee simple, in possession or remainder, against selling for a particular period of time, was valid by the common law. And we think it would be unwise and injurious to admit into the law the principle contended for by the defendant's counsel, that such restrictions should be held valid, if imposed only for a reasonable time. It is safe to say that every estate depending upon such a question would, by the very fact of such a question existing, lose a large share of its market value. Who can say whether the time is reasonable, until the question has been settled in the Court of last resort; and upon

what standard of certainty can the Court decide it? Or, depending as it must upon all the peculiar facts and circumstances of each particular case, is the question to be submitted to a jury? The only safe rule of decision is to hold, as I understand the common law for ages to have been, that a condition or restriction which would suspend all power of alienation for a single day, is inconsistent with the estate granted, unreasonable and void."

Equally important is the classic opinion of Mr. Justice Christiancy in *Mandlebaum v. McDonell*, 29 Mich., 79, from which the foregoing excerpt is taken. That decision was approved not only by this Court in *Potter v. Couch*, 141 U. S., 315, 316, but also by the English Court of Chancery in *Re Rosher*, L. R. 26 Ch. Div., 801, an unusual compliment, especially since it resulted in the rejection of the decision of Sir George Jessel in *Re Macleay*, L. R. 20 Eq., 186.

The significance of this proposition is regarded as a justification for the citation of the following pertinent decisions.

In *Smith v. Clark*, 10 Md., 186, a devise of a woodlot to the testator's wife and daughters "on the express condition that the same is not at any time to be cleared or converted into arable land," and a further condition that the land "shall be at all times held together by those who may be entitled to the same by virtue of the will," was held to be void.

In *McCullough's Heirs v. Gilmore*, 11 Pa. St., 370, the testator declared it to be his will and desire that a certain farm "fall into the possession of W, laying this injunction and prohibition not to leave the same to any but the legitimate heirs of W's father's family at his W's decease." This restraint on the power of alienation was held to be void.

In *Bennett v. Chapin*, 77 Mich., 527, it was held that when a restriction in a conveyance of a vested estate in

fee simple, in possession or remainder, is against selling for a particular time, such restriction is invalid. Mr. Justice Long said:

“Such restraints are not favored in the law. It is true that many restrictions or qualifications upon the rights of the devisee or grantee may be made effectual by making the estate itself dependent upon such condition; but where the estate granted is absolute, such restriction can impose no legal obligation upon the devisees, or limit their power over the estate, when the observance or violation of the restriction can neither promote nor prejudice any interest but their own. This rule was very fully discussed by this Court in *Mandlebaum v. McDonell*, 29 Mich., 87, and in support of this principle the Court cited *Hall v. Tufts*, 18 Pick., 459; *Bank v. Davis*, 21 Id., 42; *Brandon v. Robinson*, 18 Ves., 429; *Doebler’s Appeal*, 64 Pa. St., 9; *Craig v. Wells*, 11 N. Y., 315.

“Aside from these reasons, however, we think the restrictions upon the sale cannot be upheld. No such restrictions are valid. When a restriction in a conveyance of a vested estate in fee simple, in possession or remainder, is against selling for a particular time, such a restriction is invalid. When a person is entitled absolutely to property, any provision postponing its transfer or payment to him is void.”

In *Attwater v. Attwater*, 18 Beavan, 330, a devise of certain real estate to A “to become his property on attaining the age of twenty-five years, with the injunction never to sell it out of the family, but if sold at all it must be to one of his brothers hereinafter named,” was held to be in restraint of alienation, and void.

In *Billing v. Welch*, Irish Rep., 6 Common Law, 88, a covenant by the grantee of land that he, his heirs and assigns would not alien, sell or assign to any one except his or their child or children without the license of the grantor, was declared void on the authority of the opinion of Lord Romilly in *Attwater v. Attwater*, *supra*.

To the same effect are the decisions in *Johnson v. Preston*, 226 Ill., 447, 462, and *Pardue v. Givens*, 54 N. C., 306.

In *Anderson v. Carey*, 36 Ohio St., 506, the testator devised a farm to his two sons, Thomas and Lincoln, upon condition that they should not be allowed to sell and dispose of it until the expiration of ten years from the time his son Lincoln arrived at full age, except to one another, nor to mortgage or encumber it in any manner whatsoever except in the sale to one another. It was held that the restraint attempted to be imposed was void as repugnant to the devise and contrary to public policy.

In *Barnard v. Bailey*, 2 Harrington (Del.), 56, a condition in a devise that the devisee should not dispose of the property to the blood kin of either the testator or the devisee, was held to be bad.

In *Williams v. Jones*, 2 Swan (Tenn.), 620, there was a bequest to A on condition that she should not dispose of the property so as to allow either of four persons to get it. The condition was declared to be void.

In *Brothers v. McCurdy*, 36 Pa. St., 407, a testator directed that land devised to his son should not be sold to any person for the purpose of making brick or carrying on a brickmaking business, and more especially that he should not sell it to Lotz and Beasley, and declared that the devise of the lot was to be void in case of a sale contrary to his will, in which event the lot was to be held in common by the testator's other heirs. The gift over was adjudged to be void.

In *Renaud v. Tourangeau*, L. R., 2 Privy Counsel App., 4, where a testator in Lower Canada devised real estate to her children, providing that they should in no way alienate the property until twenty years after his death, the Judicial Counsellor, per Lord Romilly, held that the restriction "was not valid either by the old law of France, or the general principle of jurisprudence."

In 4 Kent's Commentaries, 131, Chancellor Kent, discussing this general subject, said:

“Conditions are not sustained when they are repugnant to the nature of the estate granted or infringe upon the essential enjoyment and independent rights of property and tend manifestly to public inconvenience. A condition annexed to a conveyance in fee or by devise that the grantee shall not permit waste or not take the profits, or his wife not have her dower or the husband his curtesy, the condition is repugnant and void, for those rights are inseparable from the estate in fee. Nor could a tenant in tail, though his estate was originally intended as a perpetuity, be restrained by any proviso in the deed creating the estate from suffering a common recovery. Such restraints were held by Lord Coke to be absurd and repugnant to reason and to ‘the freedom and liberty of freemen.’ The maxim which he cites contains a just and intelligent principle worthy of the spirit of the English law in the best ages of English freedom.

In the case of *Porter v. Barrett*, 233 Mich. 373, 206 N. W. Rep. 532, a contract for the sale of lots contained the following covenant:

“This land is sold upon express condition that the business of manufacturing or selling intoxicating liquors shall never be conducted thereon, or on any part thereof; that no slaughter house or nuisance of any kind, or any other thing obnoxious to a good residence neighborhood shall ever be allowed on such land, and the same shall never be sold or rented to a colored person.”

The vendors subsequently sought to recover possession of the lots because of forfeiture for the violation by assignees of the contract of the provision not to sell to a *colored person*. It was held that this proposition was invalid. We are not unmindful that the covenant above referred to made the restriction against sale and rental to colored persons perpetual, using the word “never” and that the instant case has to do with a covenant mentioned as running for a period of twenty-one years and also mak-

ing it perpetual, but we respectfully submit that the opinion of the Court covers the type of case which we are here considering. The opinion of Mr. Justice Fellows is most interpretative and says:

“Restraints on alienation are of feudal origin. But as early as the reign of Edward I there was a marked change in England brought about by the enactment of the statute *quia emptores* (18 Edward I, 235) which in part provided: ‘That from henceforth it shall be lawful to every freeman to sell at his own pleasure his lands or tenements or parts thereof; So nevertheless that the feoffee shall hold the same lands or tenements of the same chief Lord of the Fee, and by the same services and customs as his feoffer held them before.’ Littleton said (2 Coke upon Littleton, 223): ‘Also, if a feoffment be made upon this condition, that the feoffee shall not alien the land to ayn, this condition is void, because when a man is enfeoffed of land or tenements (*pur ceo que quant home est enfeoffee de terres ou tenements*), he hath power to alien them to any persons by the law. For if such a condition should be good, then the condition should oust him of all the power which the law gives him, which should be against reason, and therefore such a condition is void.’”

* * * * *

“In this country some of the courts have recognized the validity of restraints on alienation for a limited time or to particular persons. No doubt a statement of Littleton, to which we shall later refer, prompts such holding, and the statement of Justice Field in *Cowell v. Springs Co.*, 100 U. S. 55, is frequently cited to the same effect. He there said: ‘Conditions which prohibit its alienation to particular persons or for a limited period, or its subjection to particular uses, are not subversive of the estate. They do not destroy or limit its alienable or inheritable character.’ But an examination of the case then before the court shows that the question involved was a restriction of the use of the premises for the manufacture and sale of intoxicating liquors and that the statement of the learned justice was but dictum.”

The decisions in *Anderson v. Cary, supra*, *Manierre v. Welling, supra*, Gray on Restrictions on Alienation, Second Edition, p. 41, and *DePeyster v. Michael, supra*, are then referred to, and the opinion proceeds:

“Now if a restraint on alienation for a single day is bad, how can it be said that a restraint on alienation to a large class of citizens or to a small one, or even to one, is good? If it is not for the courts to determine what would be a reasonable time to restrain alienation, how can it be left to the courts to say whether a restraint on alienation to a class is reasonable or not? We must bear in mind that we are not dealing with a restraint on the use of the premises. Such restraints unless unreasonable have quite uniformly been upheld. Before the sale of intoxicating liquor was prohibited this court and practically every court of last resort in the Union upheld restraints of the use of the premises for its manufacture or sale. Restraints upon the erection of manufacturing plants in residential districts have uniformly been upheld, but would a restraint of sale to one engaged in the manufacturing business be valid? I think not. Restraint on the occupancy of premises in residential districts by colored people has been held by this court. *Parmalee v. Morris*, 218 Mich. 625, 188 N. W. 330. Does it follow that a restraint upon the right to sell property to a colored man is valid? I think not. I think the holding and the reasons for the holding in *Mandlebaum v. McDonell*, 29 Mich. 79, precludes us from sustaining as valid the restrictions before us.”

In *Johnson v. Preston*, 226 Ill. 447, which was also cited in *Porter v. Barrett, supra*, it is said:

“The general rule is that where a devise is made in fee, either of a legal or equitable interest, all limitations tending to deprive the estate of any of the incidents appertaining to the interest created are held to be repugnant to the devise, and void. To transfer a fee and at the same time to restrict the free alienation of it is to say that a party can give and not give in the same breath.”

To the same effect are the following decisions:

Winsor v. Mills, 157 Mass. 362; 32 N. E. Rep., 352;
Latimer v. Waddell, 119 N. C., 370; 26 S. E. Rep., 122;
Re Schilling, 102 Mich., 612;
Zillmer v. Landguth, 94 Wis., 607; 69 N. W. Rep., 568;
Jones v. Port Huron Engine & Thresher Co., 171 Ill.,
 502; 49 N. E. Rep., 700;
White v. White, 106 W. Va.

Independently of our public policy as deduced from the Constitution, statutes and decisions, with respect to the segregation of colored persons and the fact that the covenant sued upon is in restraint of alienation, we contend that such a contract as that now under consideration militates against the public welfare.

There can be no permissible distinction between citizens based on race, creed or color if we are to remain a free and harmonious nation. To have it appear in the judicial annals of our courts that one part of our citizenry may enter into contracts which are derogatory to another part, is intolerable, unless we are to abandon our most cherished traditions. If the different component elements constituting the body of American citizens can vote together and serve under the same flag, perform the same civic duties, pay the same taxes and cooperate in the development of our national resources, to say that a part of them shall not breathe the same air or live in the same neighborhood or pursue the same business as the other part, because they are colored, is to sow the seeds of discord and would tend to destroy that unity and harmony which should prevail in a free country.

The restrictive covenant in the present case relates to the ownership and occupation of property in a residential district. If such a covenant is valid, then what would prevent similar covenants with respect to districts devoted to commerce or manufacture? What would there be to prevent a similar covenant concerning the sale or holding of

store property on Fifth Avenue or Broadway in the City of New York, on Pennsylvania Avenue in the City of Washington, on Chestnut Street in the City of Philadelphia, on State Street in the City of Chicago, to Negroes or to any person or persons of the Negro race or blood? What would prevent such a contract with regard to land devoted to mining or to agriculture, to forestation or to any other lawful human activity?

But why need this discussion be limited to a covenant restricting the sale, conveyance, lease or gift of land to Negroes or to any person or persons of the Negro race or blood? Following the precedent created by the decisions rendered in the Court below, similar covenants have made their appearance in various parts of the country restrictive of sales and leases of land not only to Negroes, but also to Jews. It will not take long before the prohibition will be extended to Catholics, and the entire Ku Klux Klan program of elimination might be made effective by means of restrictive covenants. By means of like covenants differences might be made between rich and poor, between members of different churches, between the adherents of different political parties, between the descendants of those of different origins, between native and naturalized citizens, between those who have come from the North and the South, the East and the West. It would lead to positive public misfortune and were our Courts to sanction such covenants it would give rise to untold evils.

It also is significant that the covenant forbids the use or occupancy by or the sale, conveyance, lease, rental or gift to "any person or persons of the Negro race or blood." That would mean that a person who has flowing in his veins a single corpuscle of Negro blood would come within the prohibition of the covenant. It would have included such persons as Alexander Dumas, Pushkin, and others closer to home, one of whose remote ancestors, not only of an antecedent third or fourth generation, but of the tenth generation back, might have been a Negro. How is

that damning taint to be ascertained? Who is to determine when Negro blood changes its color? Are the courts to make the microscopic and biological tests which will determine whether an intending purchaser or occupant of premises coming within the scope of this covenant is to be precluded from the ownership or occupancy of so sanctified a piece of land?

Let us now consider the decisions bearing on the aspect of the covenant coming within the subject of our argument. See the decisions of *Gondolfo v. Hartman*, 49 Fed. Rep., 181, as discountenancing such covenants. A similar case is *Title Guarantee & Trust Co. v. Garrott*, 42 Cal. App., 150, 152, where the Court refused to enforce a condition in a deed providing for forfeiture in case of the sale or lease of property to any person of African, Chinese or Japanese descent. At page 157 the Court said:

“The rule that conditions restraining alienation, when repugnant to the estate conveyed, are void, is founded on the postulate that the conveyance of a fee is a conveyance of the whole estate, that the right of alienation is an inherent and inseparable quality of an estate in fee simple, and that, therefore, a condition against alienation is repugnant to and inconsistent with, the estate conveyed. To transfer a fee and at the same time restrain the free alienation of it is to say that a party can grant and not grant, in the same breath. But the rule is not founded exclusively on this principle of natural law. *It rests also on grounds of clear public policy and convenience in facilitating the exchange of property, in simplifying its ownership and in freeing it from embarrassments which are injurious not only to the possessor, but to the public at large.*” (Italics ours).

At page 160:

“If the continuation of the estate in the grantee may be made to depend upon his not selling or leasing to persons of African, Chinese, or Japanese descent, it may be made to depend upon his not selling or leas-

ing to persons of Caucasian descent, or to any but Albinos from the heart of Africa, or blond Eskimos. It is impossible on any known principle to say that a condition not to sell to any of a very large class of persons, such as those embraced within the category of descendants from African, Chinese, or Japanese ancestors, shall not be deemed an unreasonable restraint upon alienation, but that the prescribed class may be so enlarged that finally the restriction becomes unreasonable and void. Where shall the dividing line be placed? What omniscience shall tell us when the restraint passes from reasonableness to unreasonableness? Who can know whether he has title to land until the question of reasonableness has been passed upon by the court of last resort? No matter how large or how partial and infinitesimal the restraint may be; the principles of natural right, *the reasons of public policy*, and that principle of the common law which forbids restraints upon the disposition of one's own property, are as effectually overthrown by the one as by the other." (Italics ours.)

A petition to have the case heard in the California Supreme Court was unanimously denied September 8, 1919.

In the opinion subsequently rendered in *Los Angeles Investment Co. v. Gary*, 181 Cal., 680, which will be presently discussed, the Court referred in terms of praise and approval to the opinion of Judge Finlayson in *Title Guarantee & Trust Co. v. Garrott*, adding:

"The decision in that case was presented to us for consideration by a petition for rehearing, and the petition was denied because of our conclusion that the decision was correct, a conclusion from which we see no reason for departing."

Consequently the Supreme Court of California likewise decided that a condition or covenant that property conveyed "shall not be sold, leased or rented to one not of the Caucasian race until after January 1, 1939," was void at common law as against public policy, irrespective of the

fact that the restraint on alienation was but partial and was limited to persons of a particular class or to a comparatively brief period.

In *State v. Darnell*, 166 N. C., 300, 302, 303, 81 S. E. Rep. 338, an ordinance was adopted by the Board of Aldermen of Winston, N. C., pursuant to a provision of the city charter authorizing them to pass any ordinance which they deemed proper for the good order and general welfare of the city if it does not contravene the laws and Constitution of the State, which made it unlawful for any colored person to occupy as a residence any house upon any street on which a greater number of houses are occupied by white people than are occupied by colored people, and containing a similar provision as to white. This ordinance was declared void in an interesting opinion by Chief Justice Clark, who pointed out that such legislation was similar in its character and tendency to that which years ago prescribed in Ireland limits beyond which the native Irish or Celtic population could not reside, thus creating what was called the "Irish Pale," and similar more recent legislation in Czaristic Russia, where the Jews were restricted in the right of residence in a limited territory known as the so-called Jewish Pale of Settlement. In each instance the consequences were tragic and resulted in infinite harm, and constituted powerful incentives to disorder and revolution. The following passage in his opinion calls attention to the underlying vice of the ordinance then under consideration, in terms which we regard as equally applicable to the covenant involved in the present case:

"We do not think that the authority conferred by Section 44 of the Charter to enact ordinances for the 'general welfare of the city' can justly be construed as intended by the Legislature to authorize an ordinance of this kind which establishes a public policy which has hitherto been unknown in the legislation of our State. To do so would give the words 'general welfare' an extended and wholly unrestricted scope which we do not think the Legislature could have contem-

plated in using those words. If the Board of Aldermen is thereby authorized to make this restriction a bare majority of the board could, if they may 'deem it wise and proper,' require Republicans to live on certain streets, and Democrats on others, or that Protestants shall reside only in certain parts of the town and Catholics in another, or that Germans or people of German descent should reside only where they were in the majority, and that Irish and those of Irish descent should dwell only in certain localities, designated for them by the arbitrary judgment and permission of a majority of the aldermen. They could apply the restriction as well to business occupations as to residences, and could prescribe the localities allotted to each class of people without reference to whether the majority already therein is of the prescribed race, nationality, or political or religious faith. . . ."

It has been frequently laid down that even a restriction as to the manner of using land, in order to be valid, must not be contrary to public policy.

Whitney v. Union Railway Co., 11 Gray, 359;
DeGray v. Monmouth Beach Club House Co., 50 N. J. Eq., 329, 24 Atl. Rep., 388;
Brewer v. Marshall, 19 N. J. Eq., 537.

The Covenant is Not Ancillary to the Main Purpose of a Valid Contract and, Therefore, is An Unlawful Restrain On Alienation.

Thus far we have treated the covenant, the enforcement of which the Court below has decreed, in its general aspect. It now becomes important to call attention to an outstanding fact; namely, that at the time the covenant was entered into the various parties severally owned the several parcels of land described therein and on which at the time there had been erected separate dwelling houses. None of them at the time of its execution and in connection therewith acquired from any of the others title to the lands which they respectively owned. None of them had entered

into a contract with the others to which the covenant was ancillary. We have, therefore, an agreement between a number of land owners whereby they agreed among themselves not to sell, convey, lease, rent or give the premises owned by them respectively to Negroes or to any person or persons of the Negro race or blood.

While it may be claimed that this covenant was not one relating to trade or commerce, in the strict sense of the term, nevertheless, the tendency of the law has been to encourage the transferability of real estate with the same facility as has long existed in the case of personality. The public policy of today favors the transfer of realty from one person to another. In *Manierre v. Welling*, 32 R. I., 104; 78 Alt. Rep. 519, Mr. Justice Parkhurst, quoting the opinion of Mr. Justice Christiancy in *Mandlebaum v. McDonell*, 29 Mich., 79, expressed the prevailing policy when he said:

“... and certainly, in a country like ours, where lands are as much an article of sale and traffic as personal property, and the policy of the State has been to encourage, both the acquisition and easy and free alienation of lands, such restrictions ought not be encouraged by the Courts.”

The same idea was expressed by Mr. Justice Garber in *Test Oil Co. v. LaTourette*, 19 Okla., 214, 91 Pac. Rep., 1025, 1028.

Moreover, it has been shown under the preceding argument, long before the rule of public policy which forbade restraint of trade in merchandise or the like came into being, contracts in restraint of the alienation of realty had been treated as opposed to public policy. Hence, it is our contention that the covenant now under consideration, which, as an independent agreement between the parties thereto, limits the sale of land or its occupancy to a certain class of human beings and excludes other of God's children from the right to occupy or purchase it, in the aspect of public policy

comes at least within the rules applicable to the restraint of trade in personality. See: *United States v. Addyston Pipe Co.*, 85 Fed. Rep., 271, affd. 175 U. S., 211; also *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S., 373. The question there involved was as to whether a manufacturer, in connection with the sale of his product, may affix conditions as to the use of the article sold or as to the prices at which purchasers may dispose of it. There the condition was ancillary to a sale. Yet, it was held, for reasons about to be pointed out, that such conditions were contrary to public policy, and, therefore, void. Mr. Justice Hughes said:

“But because a manufacturer is not bound to make or sell, it does not follow that in case of sales actually made he may impose upon purchasers every sort of restriction. Thus a general restraint upon alienation is ordinarily invalid. ‘The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave or an heirloom, have been generally held void. (If a man,’ says Lord Coke, in *Coke on Littleton*, section 360, ‘be possessed of a horse or any other chattel, real or personal, and give his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest or property is out of him, so as he hath no possibility of reverter; and it is against trades and traffic and bargaining and contracting between man and man.’”

At page 406 the opinion continues:

“With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in adaptation to modern conditions. But the public interest is still the first consideration. To

sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenantee. Otherwise restraints of trade are void as against public policy. . . . 'The true view at the present time', said Lord Macnaghten in Nordenfeldt v. Maxim Nordenfeldt & Co., 1904, A. C., page 565, 'I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. *All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule.*'

Let us apply the principle of this decision to the case now under consideration. Here the various covenantors merely combined among themselves to restrain one another and their respective heirs and assigns either permanently or for a period of twenty-one years, from selling property belonging to them respectively, in the ownership of which they continued, to Negroes or any person or persons of the Negro race or blood. They thereby limited the number of possible purchasers. The effect would be either unduly to depress or unduly to increase the price at which the property might be sold. At all events it tended to restrict competition. The covenant happened to exclude from the list of possible purchasers or occupants Negroes or persons of the Negro race or blood. That excluded upwards of thirteen million citizens of the United States, or ten per cent of the entire population. If Catholics and Jews had been added to the number of those blacklisted, it would have limited the possible purchasers to the extent of upwards of twenty million more of our citizens, or an additional twenty per cent of the population.

If a covenant like that under consideration, entered into by white persons, is valid, then a corresponding covenant by colored land-owners restricting the sale of their property so as to exclude all white persons or those of the Cau-

casian race or blood as possible purchasers, would be equally permissible. That would affect at least 100,000,000 of our population. Is that not a *reductio ad absurdum* of the contention that covenants of this character are not opposed to public policy?

If the various dealers in woolen cloth or shoes or prepared articles of food carrying on business in Washington had covenanted with each other not to sell or to give any of their products to these several classes of human beings coming within the ban of their displeasure, it is believed that our courts would not long hesitate to declare such a covenant as contrary to public policy. How does the illustration differ in principle from the covenant now under discussion? The fact that in the one case the covenant relates to the acquisition of a habitation and in the other of articles of clothing or of food, does not constitute a valid ground for differentiation. As was said by Mr. Justice Holmes in *Block v. Hirsh*, 256 U. S., 156, "housing is a necessary of life." It is as much a necessity for those of the Negro race or blood as it is for those of the white race.

If covenants of this character are valid in relation to the property on one city block, they would be equally applicable to a hundred, or, if there were so many, a thousand city blocks in the City of Washington, and since, as was said in the opinion in the case just cited, "the space in Washington is necessarily monopolized in comparatively few hands," the cumulative effect of such covenants would be to drive out of the City of Washington, and for that matter out of the District of Columbia, all or most of the persons of the Negro race or blood whose business or occupation or interest it is to pursue their respective vocations in that City or District as it is a matter of public interest that they should pursue their vocations there. Such has been attempted. See *In re Lee Sing*, 43 Fed. Rep., 359. It is also interesting to note parenthetically that the covenant would practically preclude the white owner of any of the houses affected by it, to permit domestic servants of the Negro race or blood to live upon his premises.

It surely cannot be said that our courts are more tender in their consideration for those affected by trades and commerce in personal property than they are for the welfare of those human beings who desire to establish homes and to acquire the ownership or the right of occupancy of a place which they may call their own.

Mrs. Mays is certainly entitled to as much freedom from restraint upon her right to acquire a habitation where she and her family may lay their heads, as were the vendees of the patent medicine of Dr. Miles Medical Company to be free from the restrictions as to price imposed by the vendor of that panacea. She should not for a moment be lost sight of in this controversy. Her liberty to acquire property is as much involved as is the liberty of Consolidated Properties, Inc., to sell theirs. The right of each of them to contract with respect to the premises here in question is to be determined, that is, the right of disposition by the one and the right of acquisition by the other.

In the aspect of the case now under discussion, namely, that of a covenant containing a restraint on the right of alienation or of use or occupation which is not incidental to and in support of another contract, or a sale of property or of a business, it is a subject of serious consideration as to whether such a covenant entered into, as in this case, by a number of different individuals, would not constitute a common law conspiracy. The decision in *Callan v. Wilson*, 127 U. S., 540, 555, 556, would so indicate.

That case was cited in *Granada Lumber Co. v. Mississippi*, 217 U. S., 440, 441, where Mr. Justice Lurton said:

“But when the plaintiffs-in-error combine and agree that no one of them will trade with any producer or wholesaler who shall sell to a consumer within the trade range of any of them, quite another case is presented. An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of conspiracy, and may be prohibited or punished if the result be hurtful to the public or to the individual against whom the concerted action is directed” (*Callan v. Wilson*, 127 U. S. 555, 556).

To the same effect is *Eastern States Lumber Assn. v. United States*, 234 U. S., 600, 614.

While it is true that in the first of these cases the question directly involved related to the constitutionality of a statute of Mississippi, and that the second was an action brought under the Sherman Anti-Trust Act, it is nevertheless believed that the principle invoked was one which related to a common law conspiracy.

We are not unmindful of the cases relied upon in the court below to sustain the enforcement of this covenant. We contend that these decisions are unsound.

So far as they undertake to sustain the validity of such a covenant as that now under discussion, we contend that the conclusions reached are erroneous, since they disregard the legitimate scope and effect of the decision in *Buchanan v. Warley* and of Sections 1977 and 1978 of the Revised Statutes and the mischief that is inherent in such a covenant. They fail to differentiate between restrictions in deeds which prohibit the use of property for certain purposes, such as that considered in *Cowell v. Colorado Springs Co.*, 100 U. S. 57, and a covenant which constitutes a segregation of Negroes from other citizens. They likewise overlook the distinction between such a case as the present and cases like *Plessy v. Ferguson*, 163 U. S., 537, and the *Berea College Case*, 211 U. S., 45, which was fully pointed out in *Buchanan v. Warley* and in *Carey v. City of Atlanta*, 143, Ga., 192.

In *Los Angeles Investment Co. v. Gary*, *supra*, the Court as has already been pointed out, approved of the decision in *Title Guarantee & Trust Co. v. Garrott*, *supra*, in so far as to hold that a condition or covenant in partial restraint on alienation, whether limited to a particular class of persons or to a comparatively brief period, was void because contrary to public policy. The Court, however, held that so much of the covenant which it then had under consideration as provided "nor shall any person or persons other than of Caucasian race be permitted to occupy said lot or lots," was

not a restraint upon alienation, but upon the use of the property, and was, therefore, valid.

The decision was by a divided court which consisted of five members, two of whom, Mr. Chief Justice Angellotti and Mr. Justice Lennon, having dissented. It likewise appears from the opinion of Mr. Justice Olney, that the Court had "not been favored by either brief or argument on behalf of the respondents," that is, the parties against whom the condition was sought to be enforced. Moreover, the question of public policy in its broad aspects was not discussed.

The prevailing opinion further contains the striking qualification:

"In connection with this decision it may be well to add that what we have said applies only to restraints upon use imposed by way of condition, *and not to those sought to be imposed by covenant merely*. The distinction between conditions and covenants is a decided one and the principles applicable quite different." (Italics ours).

Furthermore, it would seem that, if a restriction upon alienation is opposed to public policy, a covenant which would seek to prevent the use and occupancy of property by its owner would be equally contrary to public policy. It would tend to produce the same evils as those which brought about the rule with respect to restraints on alienation. The right to use and occupy property is an essential incident of ownership. It was so recognized in *Buchanan v. Warley, supra*. Of what avail would be the right to acquire the title of property, if the grantee may not take it into his possession and enjoy its use? If Mrs. Mays could not be debarred from becoming the owner of the fee of the premises which the Consolidated Properties, Inc., was ready to convey to her, was her right of ownership to be limited to the leasing of the property to white tenants? The distinction sought to be drawn leads to a palpable absurdity.

In *Queensborough Land Co. v. Cazeaux*, 136 La., 724, and *Kohler v. Rowland*, 275 Mo., 573, the court had under con-

sideration conditions in deeds which provided for forfeiture were the premises conveyed to be sold or leased by the grantee to a Negro. In both cases it was held that the conditions did not constitute unlawful restraints upon the power of alienation.

Commenting on these decisions in his opinion in *Title Guarantee & Trust Co. v. Garrott*, Mr. Justice Finlayson said:

“With neither of them do we agree. The Louisiana case was decided in accordance with the principles of the civil law, and can throw but little, if any, light upon the construction of our Code provision, based, as it is, on the common law of England—a body of law that, ever since the statute *quia emptores*, has more and more treated land *as an article of sale and traffic*, as much so as personal property. In the Missouri case the Court in one brief paragraph disposes of this difficult question out of hand, citing but one case, *Cowell v. Colorado Springs Co.*, 100 U. S., 55, to sustain its statement that, ‘it is entirely within the right and power of the grantor to impose a condition or restraint upon the power of alienation in certain cases to certain persons, or for a certain time, or for certain purposes.’ In short, the Missouri court’s decision is based upon a dictum of Mr. Justice Field—a dictum by one of the country’s most learned jurists, it is true, but a dictum nevertheless which, so far as it refers to a time limitation upon alienation, is contrary to all the well-reasoned cases, such as *Mandlebaum v. McDonell*, *supra*, and in so far as it refers to restraints that are partial as to persons or classes of persons, is, we believe, contrary to logic and contrary to the clear implication of the Supreme Court of this State in *Murray v. Green*, 64 Cal., 367, 368, that any restraint whatever upon the power of alienation, however partial or temporary, or of whatever character, is violative of Section 711 of our Civil Code, and, furthermore, it is dictum that is pregnant with uncertainties that necessarily would produce the greatest inconvenience in the world of trade and commerce, for no one could say whether any particular restriction was reasonable until the question had been litigated to the court of last resort, and no judge could know what stan-

dard of certainty should be employed to determine the question." (Italics ours).

Further referring to *Cowell v. Colorado Springs Co.*, Mr. Justice Finlayson pointed out:

"What that learned jurist (Mr. Justice Field) said about restraint upon alienation was dictum pure and simple and not in accord with the weight of authority nor the better reasoned cases. That that part of the excerpt from the opinion of Mr. Justice Field wherein he animadverts upon restraints upon alienation, is dictum, the Federal Supreme Court itself has declared in the subsequent case of *Potter v. Couch*, 141 U. S. 315."

In this connection it is likewise proper to refer to the comments of Professor Gray upon *Cowell v. Springs Co.*, and other similar cases, in Sections 40, 52-54 of the second edition of his scholarly work on "Restraints on the Alienation of Property."

Parmalee v. Morris, 218 Mich. 625, like *Los Angeles Investment Co. v. Gary*, *Kohler v. Rowland*, and *Queensborough Land Co. v. Cazeaux*, was a case arising on a condition contained in a deed which conveyed property which was the subject of the restriction. In neither of these cases was there a covenant between independent owners of land each of whom had acquired a title free from condition or restriction of the character sought to be created. Moreover, *Parmalee v. Morris* was decided on the authority of the other three cases, and, therefore, depends upon the soundness of the reasoning of those cases, which, we contend, does not subserve the public welfare.

The opinion of Mr. Justice Moore in *Parmalee v. Morris* seems to proceed on a misunderstanding of a legitimate argument presented in opposition to the validity of such a condition. The fallacy of the conclusion reached becomes evident from these excerpts from the opinion:

"Suppose the situation was reversed and some Negro who had a tract of land platted it and stated in the

recorded plat that no lot should be occupied by a Caucasian, and that the deeds that were afterwards executed contained a like restriction; would any one think that dire results to the white race would follow an enforcement of the restriction?"

We answer that such a restriction would be as vicious as that of which we are now complaining. If the Negroes possessed the wealth of the Caucasians and could acquire property just as the Caucasians are now enabled to acquire it, would it not lead to unfortunate consequences if such a condition were aimed at a Caucasian by a Negro?

The opinion continues:

"The issue involved in the instant case is a simple one, i. e., shall the law applicable to restrictions as to occupancy contained in deeds to real estate be enforced, or shall one be absolved from the provisions of the law simply because he is a Negro?"

Our answer is that the provision is void, not "simply" because the person against whom it is sought to be enforced is a Negro, but because it is contrary to the genius of our American institutions, to the spirit of the Constitution, and to the peace, quiet, good order, unity, harmony and dignity of the people of the United States.

The attack is made on this covenant because it is opposed to the fundamental principles on which our Government rests, that all men are created equal and that they are entitled to the protection of their lives, their liberty, and their property. It is believed that our courts will not, by their decrees, effectuate a purpose which destroys our cherished traditions and which would recognize and tend to create a system of caste. The moment that there is a differentiation in our courts between white and black, Catholic and Protestant, Jew and non-Jew, hatreds and passions will inevitably be aroused, and that which has been most noble and exalted and humane in American life will have been shattered. Great as are the mental and spiritual suf-

ferings of those against whom the shafts of prejudice and intolerance are aimed, the lasting injury is, however, inflicted upon the civilization of a country which connives at a covenant such as that which has been enforced by the decrees here sought to be reviewed.

CONSTITUTIONAL POINTS INVOLVED.

The Judgment of the Court Below Constitutes a Violation of the 5th and 14th Amendments to the Constitution in that it Deprives the Appellants of Property Without Due Process of Law.

As before stated, we are aware that the courts, in the case of *Corrigan v. Buckley, supra*, spoke on the constitutionality of a restrictive covenant similar to this, but we also are aware that this court and the Supreme Court of the United States, in their recent trends, have had no hesitancy in traveling back and re-examining questions in the light of circumstances and facts as they are extant at present and applying the law of today in consonance with the present facts and justice.

Therefore, without hesitancy we ask this Court to examine this case in consonance with the surrounding circumstances and facts of today and apply the law. The Court will take judicial knowledge of the fact that because of the desperate housing conditions in Washington the Federal Government has passed legislation affecting housing all over the country. See *Homestead v. "Home Owners' Loan Act of 1933"* (June 13, 1933, 64, 31, 48 Stat. 128).

Further, the court will take notice that the situation in the District of Columbia is desperate insofar as Negro housing is concerned, to the extent that the Congress, the Citizens' Committees and newspapers of the City have taken up the situation with an attempt to ameliorate the conditions especially applicable to this District. So it is manifest that the decisions applicable years ago are not now applicable today under the present trend and conditions.

With this forword, let us turn to the decisions relating to the constitutionality of an equity court enforcing a contract of a restrictive covenant of this kind and character.

See the case of *Buckley v. Warley, supra*; there it was attempted, by legislation, in the form of a city ordinance, to forbid colored persons from occupying houses as residences or places of abode, or public assembly, on blocks where the majority of the houses were occupied by white persons for those purposes, and in like manner forbidding white persons when the conditions as to occupancy were reversed, and which based the interdiction upon color and nothing more.

Here the judgment of the lower Court of the District of Columbia has forbidden the Consolidated Properties, Inc., a corporation, from selling to Mrs. Mays, a colored person, and Mrs. Mays from buying, a house in the residential district of Washington, solely because Mrs. Mays is of Negro race or blood, and forbidding Mrs. Mays, her heirs and assigns, for a period of twenty-one years, from taking title to this property, from using or occupying it, and from selling, conveying, leasing, renting or giving it to or permitting it to be used or occupied by any Negro or Negroes or persons of the Negro race or blood.

The question that was to be determined in *Buchanan v. Warley* was thus stated by Mr. Justice Day (p. 75):

“The concrete question here is: May the occupancy, and, necessarily, the purchase and sale of property of *which occupancy is an incident*, be inhibited by the State, or by one of its municipalities, solely because of the color of the proposed occupant of the premises?” (Italics ours).

In the course of the discussion of this proposition, it was said:

“Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. *Holden v.*

Hardy, 169 U. S., 366, 391. Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land. 1 Blackstone's Commentaries (Colley's Ed.), 127."

The opinion then considers the history of the Thirteenth and Fourteenth Amendments, quoting from the *Slaughter House Cases*, 16 Wall., 36; *Strauder v. West Virginia*, 100 U. S. 303, and *Ex parte Virginia*, 100 U. S. 339, 347.

A part of the quotation from *Strauder v. West Virginia* consisted of these passages (p. 77):

"What is this (the Fourteenth Amendment) but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? . . . The Fourteenth Amendment makes no attempt to enumerate the rights its designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property. Any State action that denies this immunity to a colored man is in conflict with the Constitution."

The quotations from *Ex parte Virginia*, *supra*, is especially important:

"Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State."

It is proper to pause at this point to refer to the decision in *Virginia v. Rives*, 100 U. S. 313, rendered concurrently with *Ex parte Virginia*, where Mr. Justice Strong said:

“It is doubtless true that a State may act through different agencies,—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be done by one of these agencies or by another. Congress, by virtue of the fifth section of the Fourteenth Amendment, may enforce the prohibitions whenever they are disregarded by either the Legislative, the Executive, or the Judicial Department of the State.”

We add a further quotation from the opinion in *Ex parte Virginia* (pp. 346, 347):

“We have said the prohibitions of the Fourteenth Amendment are addressed to the States. . . . They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A state acts by its legislative, its executive or its judicial authorities. It can act in no other way.” (*Italics ours*).

In *United States v. Harris*, 106 U. S. 629, 639, this Court said:

“When the State has been guilty of no violation of its provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; *when no one of its departments has deprived any person of life, liberty, or property without due process of law, or denied to any person within its jurisdiction the equal protection of the laws; when, on the contrary, the laws of the State, as enacted by its legislative, and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress.*” *Italics ours.*

So in *Scott v. McNeal*, 154 U. S., 34, it was held that the prohibitions of the Amendment extended to "all acts of the State, whether through its legislative, its executive, or its judicial authorities."

And in *Chicago, Burlington & Quincy R. R. Co. v. Chicago*, 166 U. S., 226, 233, Mr. Justice Harlan said:

"But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities, and, therefore, whoever by virtue of public position under a State government deprives another of any right protected by that amendment against deprivation by the State, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State."

Further Mr. Justice Harlan says (pp. 234, 235):

"But a State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form."

See also *Home Telephone & Telegraph Co. v. Los Angeles*, 227 U. S. 278, where it was again declared that these provisions of the Constitution are generic in terms and are addressed not only to the States, but to every person, whether natural or judicial, who is the repository of State power, and that their reach is coextensive with any exercise by a State of power in whatever form asserted.

The same effect has been given to the due process clause of the Fifth Amendment to the Constitution. Seventy years ago, in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How., 276, Mr. Justice Curtis said:

“It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the Government.”

In *Hovey v. Elliott*, 167 U. S., 409, this Court was called upon to determine the effect of an order rendered by the Supreme Court of the District of Columbia at General Term in a contempt proceeding, which decreed that the defendants' answer be stricken out and removed from the files of the court because of non-compliance on their part with the requirements of a decree previously rendered by the court, and that the cause should then proceed as if no answer had been interposed. It was held that the action of the court was a violation of the Fifth Amendment. Mr. Justice White, in the course of his comprehensive opinion, said:

“To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends” (p. 414).

Again, on page 417, he said, in words which could be well applied here:

“If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? *If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution? If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists then in consequence of their establishment, to*

compel obedience to law and to enforce justice courts possess the right to inflict the very wrongs which they were created to prevent." (Italics ours).

Returning to the opinion in Buchanan v. Warley, supplemented by these utterances, which include in the constitutional inhibition not merely executive and legislative invasions of the right sought to be protected, but also those of the judicial arm of the Government, we find that, in giving legislative aid to these constitutional provisions, Congress made two statutory declarations, which constitute Sections 1977 and 1978 of the United States Revised Statutes. The first of these reads:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and no other."

Section 1978 declares:

"All citizens of the United States shall have the same right in every State and Territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

After referring to the authorities and statutes cited by him, Mr. Justice Day very appropriately asked: "In the face of these constitutional and statutory provisions, can a white man be denied, consistently with due process of law, the right to dispose of his property to a purchaser by prohibiting *the occupation* of it for the sole reason that the purchaser is a person of color intending *to occupy* the premises as a place of residence?" He answered:

"The statute of 1866, originally passed under sanction of the Thirteenth Amendment, 14 Stat., 27, and practically reenacted after the adoption of the Fourteenth

Amendment, 16 Stat., 144, expressly provided that all citizens of the United States in any State shall have the same right to purchase property as is enjoyed by white citizens. Colored persons are citizens of the United States and have the right to purchase property and enjoy and use the same without laws discriminating against them solely on account of color. *Hall v. DeCuir*, 95 U. S., 485, 508. These enactments did not deal with the social rights of men, but with those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color. *Civil Rights Cases*, 109 U. S. 3, 22. The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without State legislation discriminating against him solely because of color."

The opinion then refers to and distinguishes *Plessy v. Ferguson*, 163 U. S. 537, and other cases, which will be considered later. The final paragraph of the opinion states the deliberate conclusion of this Court:

"We think this attempt to prevent alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing State interference with property rights except by due process of law. That being the case the ordinance cannot stand."

We have, therefore, the solemn pronouncement of this tribunal, that it was not within the legislative power of the State, or any of its instrumentalities, to forbid the Consolidated Properties, Inc., from selling the premises to Mrs. Mays, or the latter from purchasing and occupying it.

For the reasons considered in *Buchanan v. Warley*, it would have been beyond the legislative power to have enacted that a covenant in the precise terms of that involved in the present case should be enforceable by the courts by

suit in equity and by means of a decree of specific performance, an injunction, and proceedings for contempt for failure to obey the decree. It seems inconceivable that, so long as the legislature refrains from passing such an enactment, a court of equity may, by its command, compel the specific performance of such a covenant, and thus give the sanction of the judicial department of the Government to an act which it was not within the competency of its legislative branch to authorize.

As has been shown, this court has repeatedly included the judicial department within the inhibitions against the violation of the constitutional guaranties which we have invoked.

We cannot emphasize too strongly that the immediate consequence of the decrees now under review is to bring about that which the legislative and executive departments of the Government are powerless to accomplish. It would seem to follow that by these decrees the appellants have been deprived of their liberty and property, not by individual, but by governmental action. These decrees have all the force of a statute. They have behind them the sovereignty, which speaks through the Court, that has issued a mandate to the appellants which prevents Consolidated Properties, Inc., from selling, leasing or giving its property to Mrs. Mays, and the latter from acquiring and occupying the property, simply because she is of the Negro race or blood.

In rendering these decrees, the Courts which have pronounced them have functioned as the law-making power. It is they who are seeking to effectuate the policy of racial segregation based on color. They have virtually announced to all colored persons: "You shall not inherit, purchase, lease, sell or hold real property for the acquisition of which you have entered into a contract, simply because you are of the Negro race or blood." They have told those of the white race who have entered into a covenant such as is re-

ferred to in the decrees: "You shall not sell, lease or give your property to any person of the Negro race or blood."

They have practically declared: "If the owners of property in a particular locality, however extensive its area may be, see fit to agree on such a policy of segregation, these Courts, sitting in equity, may nevertheless by their decrees enforce such a policy, even if it be conceded that they would be prohibited from doing so by the decision of the Supreme Court of the United States if the legislative branch of the Government had established a like policy."

To test the incongruity of such a situation, let us suppose that after the decision in *Buchanan v. Warley* the Common Council of the City of Louisville had adopted an ordinance permitting the residents of the same districts which were affected by the ordinance which this Court had declared unconstitutional, to enter into a covenant in the precise terms of that which the Courts below have enforced in this case, would it not at once have been said that it was an intolerable invasion of the Constitution as interpreted by this Court. But that is exactly what has been done in the present case by the adjudications which are now here for review.

Or let us suppose, that after the rendition of these decrees, Consolidated Properties, Inc., standing on its constitutional rights, had executed a deed of the premises here in question to Mrs. Mays, and the latter had proceeded to occupy them, would it have been within the competency of the court to have imprisoned either or both of them as for a contempt of court? The exercise by the Court of its power to enforce its decrees through the medium of contempt proceedings, would be nothing more or less than the enforcement of the policy of racial segregation based on color, in violation of the letter and spirit of the Constitution as interpreted in *Buchanan v. Warley*.

After *Buchanan v. Warley* had been remanded by the Supreme Court to the Kentucky Court of Appeals for further proceedings not inconsistent with the opinion ren-

dered, would the Supreme Court have countenanced an amendment of the decree which it had reversed, providing that ninety per cent of the residents of the district in which segregation had been attempted might enter into a covenant in precisely the same terms as the ordinance and that, thereupon, such covenant should be in full force and effect?

In *Gondolfo v. Hartman*, 49 Fed. Rep., 181, Judge Ross said:

“It would be a very narrow construction of the constitutional amendment in question and of the decisions based upon it, and a very restrictive application of the broad principles upon which both the amendment and the decisions proceed, to hold that, while the State and municipal legislatures are forbidden to discriminate against the Chinese in their legislation, a citizen of the State may lawfully do so by contract, which the *Courts may enforce*. Such view is, I think, entirely inadmissible. Any result inhibited by the Constitution can no more be accomplished by contract of individual citizens than by legislation, and the Court should no more enforce the one than the other. This would seem to be very clear.”

After citing *Kennett v. Chambers*, 14 How., 49, the opinion continued (p. 183):

“But the principle governing the case is, in my opinion, equally applicable here, where it is sought to enforce an agreement made contrary to the public policy of the government, and in violation of the principles embodied in its Constitution. Such a contract is absolutely void and should not be enforced in any court, certainly not in a court of equity of the United States.”

The Fourteenth as well as the Fifth Amendment to the Constitution of the United States applies to the District of Columbia. In *Downes v. Bidwell*, 182 U. S., 244, 259, 263, the applicability of the Constitution to the District of Columbia was exhaustively considered. Referring to *Loughborough v. Blake*, 5 Wheat., 317, attention was called to the

fundamental fact that the District of Columbia consisted of territory which had been originally a part of the States of Maryland and Virginia. Subsequently, in 1846, the portion of the territory granted by Virginia was retroceded to that State (9 U. S. St. L., 35; *Evans v. United States*, 31 App. D. C., 544). Therefore the territory that now constitutes the District of Columbia was Maryland territory. Consequently, as said by Mr. Justice Brown:

“It had been subject to the Constitution and was a part of the United States. The Constitution had attached to it irrevocably. There are steps which can never be taken backward. The tie that bound the States of Maryland and Virginia to the Constitution could not be dissolved, without at least the consent of the Federal and State governments to a formal separation. The mere cession of the District of Columbia to the Federal government relinquished the authority of the States, but it did not take it out of the United States or from under the aegis of the Constitution. Neither party had ever consented to that construction of the cession. If, before the District was set off, Congress had passed an unconstitutional act, affecting its inhabitants, it would have been void. If done after the District was created, it would have been equally void; in other words, Congress could not do indirectly by carving out the District what it could not do directly. The District still remained a part of the United States, protected by the Constitution. Indeed, it would have been a fanciful construction to hold that territory which had been once a part of the United States ceased to be such by being ceded directly to the Federal Government.”

It was accordingly held that Article I, Section 8, of the Constitution, which gave Congress the power “to lay and collect taxes, imposts and excises” which “shall be uniform throughout the United States,” extended to the District of Columbia. This conclusion, so far as it affected the District of Columbia, was approved in the opinion of Mr. Justice Brown, although he and four other Justices of this

Court did not consider the constitutional provision there under consideration as applicable to the Territories. On the other hand, however, the members of the Court who were in the minority, namely, Chief Justice Fuller, Mr. Justice Harlan, Mr. Justice Brewer and Mr. Justice Peckham, went even further than Mr. Justice Brown, and held that the constitutional provision followed the flag and operated throughout "the geographical unit known as the United States," "our great Republic, which is composed of States and Territories" (182 U. S., 356). *It follows that a majority of the Court recognized that the Constitution applied to the District of Columbia as a whole.*

In the case of *Geofroy v. Riggs*, 133 U. S., 258, this Court had occasion to consider the phrase "States of the Union" as contained in a clause of a treaty between the United States and France which related to the right of Frenchmen to enjoy the privilege of possessing personal and real property in "the States of the Union." There the question arose as to whether under this treaty, a citizen of France could take land in the District of Columbia by descent from a citizen of the United States. It was held that the District of Columbia, as a political community, was one of "the States of the Union" within the meaning of that term as used in the treaty, Mr. Justice Field saying in support of that conclusion:

"This article is not happily drawn. It leaves in doubt what is meant by 'States of the Union.' Ordinarily these terms would be held to apply to those political communities exercising various attributes of sovereignty which compose the United States, as distinguished from the organized municipalities known as Territories and the District of Columbia. And yet separate communities, with an independent local government, are often described as states, though the extent of their political sovereignty be limited by relations to a more general government or to other countries. Halleck on Int. Law, c. 3, sections 5, 6, 7. The term is used in general jurisprudence and by writers on

public law as denoting organized political societies with an established government. Within this definition the District of Columbia, under the government of the United States, is as much a State as any of those political communities which compose the United States. Were there no other territory under the government of the United States, it would not be questioned that the District of Columbia would be a State within the meaning of international law; and it is not perceived that it is any less a State within that meaning because other States and other territory are also under the same government. In *Hepburn v. Ellzey*, 2 Cranch, 445, 452, the question arose whether a resident and a citizen of the District of Columbia could sue a citizen of Virginia in the Circuit Court of the United States. The Court, by Chief Justice Marshall, in deciding the question, conceded that the District of Columbia was a distinct political society, and therefore a State according to the definition of writers on general law; but held that the act of Congress in providing for controversies between citizens of different States in the Circuit Courts, referred to that term as used in the Constitution, and therefore to one of the States composing the United States. A similar concession, that the District of Columbia, being a separate political community, is, in a certain sense, a State, is made by this Court in the recent case of *Metropolitan Railroad Co. v. District of Columbia*, being a separate political community, is, in a certain sense, a State, is made by this Court in the recent case of *Metropolitan Railroad Co. v. District of Columbia*, 132 U. S. 1, 9, decided at the present term."

In *Talbot v. Silver Bow County*, 139 U. S. 444, Mr. Justice Brewer, referring to a statute of Montana Territory which undertook to tax the shares of a national bank pursuant to Section 5219 of the Revised Statutes, which conferred the power of taxation upon the legislature of each State, no reference being made to Territories, said:

"But it would militate much against its national character if banks organized under it (the national banking system) were subjected to local taxation in one

part of the Union, and exempted from it elsewhere. No such intent ought lightly to be imputed to Congress. . .

"Still further, while the word 'State' is often used in contradistinction to 'Territory', yet in its general public sense, and as sometimes used in the statutes and the proceedings of the government, it has the larger meaning of any separate political community, including therein the District of Columbia and the Territories, as well as those political communities known as States of the Union. Such a use of the word 'State' has been recognized in the decisions of this Court."

Then follow quotations from *Hepburn v. Ellzey*, *Metropolitan Railroad Co. v. District of Columbia* and *Geofroy v. Riggs*, *supra*.

At all events, there can be no question but that the due process clause of the Fifth Amendment applies to the District of Columbia, and, as has been shown, the same interpretation that has been given to the Fourteenth Amendment as to its applicability to the action of the judicial as well as of the executive and legislative departments of the Government, has been given to the Fifth Amendment.

5. The Court erred in not holding that the Equity Court is without right to enforce an agreement, the very entering into of which is in derogation of Article 4, Section 2 of the Constitution of the United States and the legislation enacted in support thereof.

The Right to Take and Hold Property is Protected by the Constitution and Laws of the United States.

The right to take and hold property is one of the fundamental and inherent rights and immunities guaranteed against invasion by the Constitution of the United States.

"The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." Article IV, Sec. 2, U. S. Constitution.

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; . . .” Amendment XIV, Sec. 1, U. S. Constitution.”

“No person shall . . . be deprived of life, liberty or property, without due process of law; . . .” Amendment V, U. S. Constitution.

While the courts have been astute to refrain from enumerating all the “privileges and immunities,” they are practically unanimous in including the right to acquire, hold, use, and dispose of property, both real and personal, as one of those rights. See: *Ward v. Maryland*, 13 Wall. 418, 430 (1870); *The Slaughterhouse Cases*, 16 Wall. 36, 76 (1872).

It is immaterial for the purposes of this discussion to labor the question whether the right to acquire and hold property is to a right inherent in state or federal citizenship. While there may be room for academic argument upon this point, there can be no difference upon the proposition that it is one of the fundamental liberties that attach to one of these citizenships and that whichever it may be, is safe from attack by either the state or federal government by virtue of the above quoted provisions of the federal Constitution. See: *Buchanan v. Warley*, *supra*; *Harmon v. Tyler*, 273 U. S. 668; 47 S. Ct. 471, 71 L. Ed. 831 (1927); *City of Richmond v. Dean*, 37 Fed. (2d) 712, (C. C. A. Va. 1930) *aff'd*, 281 U. S. 704, 74 S. Ct. 1128 (1930); *In re Lee Sing*, 43 F. 359 (C. C. Calif. 1890); *Liberty Annex Corp. v. Dallas*, 289 S. W. 1067 (Tex. Civ. App. 1927).

And these protections are equally applicable to the residents of the District of Columbia. See *Lappin v. District of Columbia*, 22 App. D. C. 76; *Neild v. District of Columbia*, 71 App. D. C. 306, 110 Fed. (2d) 246 (1940).

But Congress has not been content with the protection afforded in the basic framework of the Government. Instead, in order to clearly demonstrate the purpose of the people of the United States that there should be no limita-

tion upon the right of a citizen to acquire and hold property, Congress enacted legislation which makes the right of such acquisition one that is protected by the laws of the land as well as the Constitution. In 1866 the following provision was enacted:

“All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.” W. S. C. Tit. 8, Sec. 42, R. S. 1798.

Its constitutionality is well settled. See: *U. S. v. Harris*, 106 U. S. 629, 1 S. Ct. 601, 27 L. Ed. 290 (1882); *U. S. v. Morris*, 125 Fed. 322 (D. C. Ark. 1903); *Buchanan v. Warley*, *supra*.

Similar enabling legislation making the right to make and enforce contracts is found in the Act of May 31, 1870, c. 114, sec. 16, 16 Stat. 144, R. S. 1877, U. S. C. Tit. 8, Sec. 41.

It thus becomes abundantly clear that Negro citizens of the District of Columbia have an inherent right to contract for, acquire by lease or purchase, occupy, use and sell real property, one which is recognized by the Constitution of the United States and protected by the laws thereof.

A Covenant by Two or More Landowners to Deny Appellants to Acquire, Use or Dispose of Land Constitutes a Criminal Conspiracy and is Indictable as Such.

The foregoing argument demonstrates conclusively that the right of appellant Mays to acquire, use, and occupy land is a right that is one protected by both the Constitution and the laws of the United States: A similar right of disposition of its land rests in the appellant Consolidated Properties, Inc. (See *Buchanan v. Warley*, *supra*). *Being such a right, a conspiracy to injure or oppress appellants in the exercise thereof becomes a federal crime.*

“If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise

or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same . . . they shall be fined not more than \$5,000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any place of honor, profit, or trust created by the Constitution or laws of the United States.”

R. S. 5508~~6~~; Act of March 4, 1909, C. 321, Sec. 19, 35 Stat. 1092, V. S. C. Tit. 18, Sec. 31.

No more drastic interpretation of the intent of Congress to enforce the protection of the privileges and immunities of citizens can be conceived. A fine of \$5,000 *and* imprisonment of ten years, *plus* deprivation of the right to any position of honor, profit or trust is sufficiently indicative of the seriousness of the violation.

There is no doubt that a written agreement, solemnly executed, and recorded as a deed, by a group of property owners to the effect that a person shall be deprived of his right to acquire property solely because of his race and color, is evidence of the highest order of the conspiracy to deprive such person of a privilege or immunity protected by the Constitution and laws of the United States. The agreement alone is sufficient to constitute the crime even though no overt act be committed. *Montoya v. U. S.*, 262 Fed. 759 (C. C. A. C). But here there is an overt act—the bringing of the present litigation to oust the appellant Mays.

It should be noted that here the essence of the crime does not rest on governmental action—either state or federal. The gravamen lies in the *conspiracy among individuals* to injure one in his federal rights. Nor is it any defense that the motive of the party joining the controversy was not illegal at the time he joined, if thereafter he knew or should have known of its illegality. *U. S. v. Mitchell*, Fed. Cas. Co. 15, 750 (1871).

The specific question at bar has been passed upon by a Federal District Court in Arkansas. In the case of *U. S. v. Morris, supra*, after showing that by virtue of the Thirteenth Amendment to the Constitution of the United States Congress had the power to enact this legislation regarding the acts of individuals, the court proceeded to discuss the validity of an indictment of certain defendants who had conspired to keep Negroes from the right to lease and cultivate private lands. In an elaborate and scholarly review of the history of the act, the court came to the conclusion that a mere agreement to keep Negroes out of lands was the very type of act prohibited by the legislation and concluded:

“That the rights to lease lands . . . are fundamental rights inherent in every free citizen, is indisputable; and a conspiracy by two or more persons to prevent Negro (sic) citizens from exercising these rights because they are Negroes (sic) is a conspiracy to deprive them of a privilege secured to them by the Constitution and laws of the United States, within the meaning of Section 5508, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3712).

See also 107 A. L. R. 1363, *et seq.*

The Court is Forbidden by the Constitution of the United States to Enforce the Provisions of the Covenant in Question.

From the preceding argument only one conclusion is deducible. The covenant constitutes a conspiracy to violate the laws and the Constitution of the United States. Only one question remains—may a Federal Court, acting as a part of the Federal Government, enforce such an agreement when the effect of enforcement will be to deprive a citizen of one of her privileges or immunities? No argument is admissible that the action of the Court would not be the action of the government. *Strauder v. W. Va.*,

100 U. S. 303, (1879); *Virginia v. Rives*, 100 U. S. 313 (1879); *Ex parte Virginia*, 100 U. S. 393.

The question then arises—may the Federal Government, acting through its courts, as this court is now asked to do in the litigation below, enforce an agreement which clearly violates Article IV, Sec. 2, Amendments V and XIV of the Constitution of the United States, as well as the laws thereof protecting the same rights to property heretofore cited? The answer is unmistakably made in *Kennett, et al. v. Chambers*, 14 How. 38 (1852) when Chief Justice Taney said:

“The question is . . . whether such a contract, made at that time, within the United States for the purposes stated in the contract and the bill of complaint, was a legal and valid contract, and such to entitle either party to the aid of the courts of justice of the United States to enforce its execution. . . .”

“For as the sovereignty resides in the people, every citizen is a portion of it and is himself personally bound by the laws which the representatives of the sovereignty may pass . . . within the scope of their delegated authority. . . . It is his own personal compact as a portion of the sovereignty in whose behalf it is made. And he can do no act, nor enter into any agreement to promote or encourage revolt of hostilities against the territories of a country with which our government is pledged by treaty to be at peace, without a breach of his duty as a citizen, and the breach of the faith pledged to the foreign nation. *And if he does so he cannot claim the aid of a court of justice to enforce it; . . . our own freedom cannot be preserved without obedience to our own laws, nor social order preserved if the judicial branch of the government countenanced and sustained contracts made in violation of the duties which the law imposes. . . .*” (Italics ours).

The proposition here advanced by Chief Justice Taney has never been questioned. In fact, it cannot be questioned except by revolution. The signatories to the cove-

nant at bar are also signatories to Article IV, Sec. 2, Amendments V and XIV, Sec. 41, 42 Tit. 8, U. S. C., and Sec. 51 Tit. 18 U. S. C. They obviously contradict each other. They cannot stand together. Will this court permit them to deny their solemn adherence to the Constitution and laws, and say their criminal compact is not only to be given precedence, but to receive judicial sanction?

Speculation on the question is unnecessary. The Federal Courts have already spoken. It has unanimously held that conspiratorial agreements such as here involved cannot be enforced through the medium of the very agencies designed to protect privileges and immunities. The leading case is *Gondolpho v. Hartman*, *supra*. There the court held that a *covenant* restricting the lease of property to others than those of the Chinese race was—

“... contrary to public policy of the government, in violation of a principle embodied in its constitution. *Such a contract is absolutely void and should not be enforced in any court—certainly not in a court of equity of the United States.*” (Italics ours).

The principle has been repeatedly applied. Federal courts have consistently refused to enforce contracts which embody provisions violative of our Constitution or laws. See: *Fox v. Gardner*, 21 Wall. 475; *The Spartan*, 25 Fed. 44 (1885); *Ex parte Reeves*, 121 Fed. 848 (1903); *The Fri*, 154 Fed. 333 (1907); *Grosman v. Union Trust Co.*, 228 Fed. 610 (1916); *Lakes v. Saliaris*, 116 F. (2d) 440 (1940); *Lee v. Boise Development Co.*, 21 Ida. 461, 122 P. 851 (1912); *Porter et al. v. Barrett et al.*, 233 Mich. 373, 206 N. W. 532 (1925); L. R. A. 1916 B, 1208, 1209; 9-A. L. R., 120 *et seq.*

As is said in *Ex parte Reeves*, *supra*, to enforce the rights contended for here by appellees would be to allow the very makers of our laws to do indirectly that which they have said in solemn form and under highest sanction *they* shall not do directly. The jewel of consistency must not be so tarnished—at least at the hands of a Federal

agency. The right here sought to be protected by appellant Mays is not hers alone—it is the right of Americans—to preserve their fundamental liberties against the tyranny of a temporary majority. Jones, J., foresaw this in *Ex parte Reeves, supra*, when he said, at p. 856:

“Is it only the claim of a private, individual which is here involved?—The principle here involved affects the rights of millions of parents in this land. The matter is one of highest public concern, in comparison with which the insignificance of the individual or his inconvenience sinks out of sight. Who determines what is to ‘the interest of the public ? What are the sources to which we must resort to ascertain what is public policy, and what it requires?’ Assuredly, only the will of the people, as declared in the law of the land.”

If here the Court should enforce the provisions of the covenant now before it then the Court must assume the burden of declaring that the prejudices and inconveniences of a few individuals shall so far outweigh the expressed declarations of millions of citizens that one of the tripartite divisions of our Federal Government shall lend its unchallenged arm to the overriding of the will of those millions as expressed in our Constitution and our laws: Therein lies the germ of anarchism.

It is respectfully submitted that in a government of law and by law the courts may not enforce a contract, such as is here presented, which negates in its very languages the principles upon which our Government was founded.

Respectfully submitted:

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APPENDIX

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IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 8831.

CLARA I. MAYS, ET AL., *Appellant,*

v.

WILLIAM T. BURGESS, FRANCES E. BURGESS,
H. P. GUMBRECHT, AGNES B. MULARKEY,
MARY C. CARLETON, *Appellees,*

and

JANE COOK, Consolidated Properties, Inc., *Appellants,*

v.

WILLIAM T. BURGESS, FRANCES E. BURGESS,
H. P. GUMBRECHT, AGNES B. MULARKEY,
MARY C. CARLETON, *Appellees.*

Appeals from the District Court of the United States for the
District of Columbia.

APPENDIX TO BRIEF FOR APPELLANT.

**PLEADINGS. DOCKET ENTRIES AND OTHER PAPERS
DESIGNATED BY APPELLANT.**

1 Filed March 13, 1944.

In the District Court of the United States
For the District of Columbia.

Civil Action No. 23436.

WILLIAM T. BURGESS, FRANCES E. BURGESS, 2209 First
Street, N. W., H. P. GRUMBRECHT, 2211 First Street,
N. W., AGNES B. MULARKEY, MARY C. CARLETON,
2221 First Street, N. W., *Plaintiffs,*

v.

CLARA I. MAYS, 2213 First Street, N. W., JANE COOK, 1807
Irving Street, N. W., CONSOLIDATED PROPERTIES, INC.,
1807 Irving Street, N. W., *Defendants.*

Complaint for Injunction.

The plaintiffs respectfully represent to this Honorable
Court as follows:

1. That plaintiffs are citizens of the United States and
residents of the District of Columbia.

2. That defendants Clara I. Mays and Jane Cook are
citizens of the United States and residents of the District
of Columbia, and that Consolidated Properties, INCOR-
PORATED, is a corporation organized under the Laws of
the State of Delaware.

3. That defendant, Clara I. Mays, is the present owner
of record of a certain parcel of real estate in the District
of Columbia, described as: "Lot numbered thirty-one (31)
in Martin T. Dryden's subdivision of lots in Block num-
bered Nineteen (19) in "C. W. Dobbins' Addition to the
City of Washington", as per plat recorded in the Office
of the Surveyor for the District of Columbia in Liber
County 19, at folio 75," and now known as Lot 31 in
Square 3123, with improvements thereon known as 2213
First Street, Northwest.

4. That the plaintiffs Burgess are the owners in fee simple and the occupants of Lot 29, Square 3123, improved by premises No. 2209 First Street, Northwest. The plaintiff, H. P. Grumbrecht, is the owner in fee simple and the occupant of Lot 30, Square 3123, improved by premises 2211 First Street, N. W. The plaintiffs, Agnes B. Mularkey and Mary C. Carleton, are the owners in fee simple and the occupants of Lot 35 in Square 3123, improved by premises 2221 First Street, N. W. Plaintiffs are all persons of the White (or Caucasian) race, and signers of or subject to the Restrictive Agreement hereinafter referred to.

5. That all of the real estate described herein as being owned by the plaintiffs and the defendant, Clara I. Mays, is located on the East side of First Street, N. W., between W and Adams Streets. The property of the plaintiffs Burgess is the second house south of the property owned and occupied by the Negro defendant, Clara I. Mays; the property of the plaintiff Grumbrecht is the house immediately south of the property owned and occupied by said Clara I. Mays. The property of the plaintiffs Mularkey and Carleton is the fifth house north of the property owned and occupied by the said Clara I. Mays.

6. That on or about September 1, 1925 all of the then fee simple owners of the properties on the East and West sides of said First Street, between W and Adams Street, joined in the execution of an Agreement, the pertinent paragraphs of which are:

“WHEREAS the said parties hereto are all owners of real estate situated in the District of Columbia, and located on First Street, between W and Adams Streets, Northwest, both on the East and West sides of said street, said property being parts of squares 3122 and 3123, as recorded in the Surveyor's Office of the District of Columbia; and

WHEREAS the said parties hereto desire, for their mutual benefit, as well as for the best interests of the said community and neighborhood, to improve in any legitimate way

and further the interests of said community and neighborhood;

NOW, THEREFORE, in consideration of the premises and the sum of five dollars each to the other in hand paid, the parties hereto do hereby mutually agree, promise and covenant, each with the other and for their respective heirs and assigns, that no part of the land now owned by the parties hereto, a more definite description of said property being given after the respective signatures hereto, shall ever be used or occupied by, or sold, conveyed, leased, rented or given to Negroes or any person or persons of the Negro race or blood. This covenant shall run with the land and bind the respective parties hereto, their heirs and assigns, for the period of twenty-one years from and after the date of these presents;”

which said Agreement was duly recorded among the Land Records of the District of Columbia on October 6, 1925 in Liber No. 5584, folio 377, et seq. The plaintiffs herein have continuously lived in their respective homes since purchasing same.

3 7. That at this time all of said properties, as recited in Paragraph 6 hereof, are still owned and/or occupied by persons of the White (or Caucasian) race, with the exception of said premises known as 2213 First Street, N. W., which now stands in the name of the Negro defendant, Clara I. Mays. Furthermore, plaintiffs show the Court that all of the properties on both sides of First Street, Northwest, from Rhode Island Avenue north to the Soldiers Home, including also all intersecting streets between North Capitol and First Streets Northwest are owned and/or occupied by persons of the White (or Caucasian) race.

8. That, on the 24th day of February, when your Complainants learned that the Negro defendant, Clara I. Mays, had moved into said 2213 First Street, N. W. on the 21st day of February, 1944, they caused a Registered letter to

be mailed to her by their attorney, Henry Gilligan, a member of the Bar of this Court, as follows:

"Information has reached me that you moved into the above premises (2213 First Street, N. W.) on February 21st, and that you are of the colored race. On behalf of property holders in the 2200 Block of First Street I am herewith putting you on notice that, under both a deed covenant and a Restrictive Agreement, persons of the Negro race or blood are prohibited from owning, renting or occupying any property in this block, including 2213 First Street, N. W., now occupied by you. Unless you agree to remove from said premises on or before February 29th, 1944 I am authorized to bring Injunction proceedings against you and the owner of the property, requiring you by court order to remove from the premises.

I may be wrong, but my judgment is that you were not informed by the owner or her agent that your occupancy of the property was prohibited. I shall be most happy to have you call at my office so that I may explain the situation to you, in the hope that we may amicably settle the problem that has arisen. If you are the innocent victim in the matter, you should find the way to make the owner reimburse you for all your expense in moving in and out. I shall be glad to talk with your attorney, if you prefer not to see me personally—or to talk with both your attorney and yourself,—as I would much prefer not to take court action which in the end will place much additional cost on you. It is for this added reason I am writing you. The matter is most important, however, and I shall not wait on you beyond February 29th, but will be prepared to bring suit on March 1st, if I do not hear from you. I urge you to show this letter to your attorney immediately."

9. That said Restrictive Agreement was executed by the then owner of 2213 First Street, N. W., namely: Francis H. Melick. Thereafter, by deed bearing date the 28th day of October, 1943, and recorded as Instrument No. 30649 on

November 26, 1943 in Liber 7916, folio 7, the heirs at law of the said Francis H. Melick (deceased) conveyed said property to the defendant, Consolidated Properties, Inc., of which Thomas P. Stathes is the president, and Peter T.

4 Stathes is the secretary, both residing at 1807 Irving Street, N. W. By deed dated January 4th, 1944 and recorded on January 6, 1944 as Instrument No. 446 in Liber 7927 at folio 425, said Consolidated Properties, Inc. conveyed said property to one Jane Cook; because of defects in said conveyance a deed of correction between the same parties was filed for record on February 11, 1944 in Liber 7939 at folio 167. By deed dated February 15th, 1944, and recorded as Instrument No. 4587 on February 17th, 1944, Jane Cook, a person of the White race, conveyed said property to Clara I. Mays, the Negro defendant, who moved into the said property on February 21st, 1944. Your complainants are informed and believe and therefore aver that said Jane Cook is merely a "straw" party for the Consolidated Properties, Inc., which was the real owner of said property at the time of its conveyance to the said Clara I. Mays. On March 6th, 1944 they caused their attorney, Henry Gilligan, to send the following letter to Peter T. Stathes, the secretary of the Consolidated Properties, Inc., 1807 Irving Street, N. W. by Registered and Special Delivery mail (Registry Receipt No. 870938):

"After considerable investigation for property holders in the 2200 block of First Street, N. W. I have satisfied myself that your statement to me, made on February 27th, that the only thing you knew regarding Jane Cook was that she was a New York woman, and that she was neither a daughter nor sister of yours, is untrue. Jane Cook is a "straw" person only, for the purpose of completing a sale by your company to a negro woman by the name of Clara Mays, who is now living in the property. I have notified Miss Mays, both in writing and personally, that injunction proceedings would be instituted against her on Tuesday of this week unless by that time she satisfied me, for my

clients, that she was ready to move from the premises and deed the property to some person of the white race.

Inasmuch as it will be proper to include the vendor of this property to Miss Mays in this proceeding I am herewith putting your corporation on notice (and you personally also) that, under the Restrictive Agreement covering the properties in the 2200 block of First Street, the sale to or occupancy by a Negro is illegal. Unless I hear from you by Wednesday morning, March 8th, that you are endeavoring to undo the great damage you have done immediately, injunction proceedings will be started against you and Miss Mays. She informed me she would see you before tonight in an effort to get this property transaction set aside. I am giving you until Wednesday morning in the hope that you will find the way to undo this wrong, which you may be sure will not be tolerated.

While writing you I wish to express my surprise at your action and my great disappointment in you. I talked with you at length regarding this Negro question and our community when you were endeavoring to purchase 2320 First Street, N. W., and explained to you that all of First Street and to the east from Rhode Island Avenue north was restricted territory on the Negro question. You stated to me you intended to do with 2320 what you had done with other property; that is, put it in good repair and keep it as an investment. I was informed several weeks ago Negroes were looking at 2320 First Street. I want you to understand definitely that no sales in restricted territory in this community will be allowed to stand—to Negroes. Instead of doing your best to break up a fine community you ought to cooperate with us in keeping it white. If you don't, we shall use every legal effort to see that you do."

5 10. Complainants are advised and believe that the above-mentioned deed and conveyance of premises, to wit: lot 31 in square 3123, improved by dwelling house known as 2213 First Street, N. W. by the Consolidated

Properties, Inc. through its "straw" party, Jane Cook, to the Negro defendant, Clara I. Mays, is a nullity and of no effect, and is totally void; and said alleged deeds and conveyances confer no rights of property upon said defendant, Clara I. Mays, for the reason that the said Clara I. Mays unlawfully and wilfully acquired said title, and accepted said conveyance in violation of the aforesaid agreement of record; that the continued occupancy of said property by the defendant, Clara I. Mays, as well as the permitting of the deed and conveyance from said Consolidated Properties, Inc. through its "straw" party, Jane Cook, to remain a matter of record, and said grantee to continue the owner and occupant of said property, will be injurious, depreciative and absolutely ruinous of the real estate owned by plaintiffs, and will be harmful, detrimental and subversive of the peace of mind, comfort and property rights and interests of plaintiffs and of all other property owners in said 2200 block of First Street, N. W., as well as in the whole community, and said neighborhood will become depreciative in value and undesirable as a neighborhood wherein white people may live; that the continued occupancy and/or ownership by the defendant, Clara I. Mays, or any person or persons of the negro race or blood, will constitute a continuing wrong and injury that is irreparable, and is incapable of ascertainment and compensation in damages, and the only remedy is by way of injunction.

WHEREFORE, plaintiffs demand:

1. That the defendant, Clara I. Mays, be enjoined, during the pendency of this suit, and permanently thereafter, from selling, renting, leasing, transferring or conveying premises 2213 First Street, N. W., in the District of Columbia, to Negroes or colored persons, or persons of the negro race or blood, and from permitting said premises to be occupied by said Negroes or persons of the negro race or blood.
2. That the defendant, Clara I. Mays, be enjoined pending this suit, and permanently thereafter, from occupying premises 2213 First Street, N.W., in the District of Colum-

6 bia, and that said defendant, by order of this Court,
 be directed to vacate immediately said premises, and
 to remove therefrom all household goods and other
 property belonging to said defendant.

3. That the deed dated February 15th, 1944 and recorded
 as Instrument No. 4587 on February 17th, 1944 among the
 Land Records of the District of Columbia from the defen-
 dant, Jane Cook, to the defendant, Clara I. Mays, be can-
 celled, and a judgment be entered herein declaring said con-
 veyance void and of no effect, and further declaring title
 to be in Jane Cook, subject to the restrictions of the Agree-
 ment herein set forth.

4. That plaintiffs have judgment for costs, and that a
 reasonable attorney's fee be allowed.

5. That they be allowed such other and further relief as
 shall be required.

WILLIAM T. BURGESS
 FRANCES E. BURGESS
 H. P. GRUMBRECHT
 AGNES B. MULARKEY
 MARY C. CARLETON.

District of Columbia, ss:

H. P. Grumbrecht, on oath deposes and says that he is
 one of the plaintiffs in this cause and he has read the afore-
 going complaint by him subscribed; that the statements
 therein made are true to the best of his knowledge, informa-
 tion and belief.

H. P. GRUMBRECHT

SUBSCRIBED and sworn to before me this 11th day
 of March, 1944.

A. B. KEEFER,
Notary Public, D. C.

(Seal)

HENRY GILLIGAN,
Attorney for Plaintiffs,
 1021 Washington Loan & Trust Building.

* * * * *

Filed Apr. 10, 1944

Answer of Defendant Mays to Complaint For Injunction

1 and 2. Defendant Clara I. Mays admits the allegations contained in paragraphs 1 and 2 of the complaint filed herein, except insofar as the plaintiffs allege that the Consolidated Properties, Incorporated, is a corporation organized under the laws of the State of Delaware, and with regard to this fact, this defendant is without knowledge and is advised that she is not called upon to answer.

3. This defendant admits the allegations of paragraph 3 of the said complaint.

4. This defendant is without knowledge as to the allegations of paragraph 4, and therefore neither admits nor denies same, but should the same become material, demands strict proof thereof.

5. This defendant admits so much of the allegations contained in paragraph 5 as allege that the property owned by the defendant Clara I. Mays is located on the east side of First Street Northwest, between W and Adams Streets Northwest. As to the remaining allegations of paragraph 5 this defendant is without knowledge, and therefore neither admits nor denies same, but should same become material, strict proof will be required.

8 6. This defendant denies the allegations of paragraph 6 of the complaint filed herein, and avers the fact to be upon her information and belief that all of the fee simple owners of properties on the east and west sides of said First Street Northwest, between W and Adams Streets Northwest, did not join in the execution of an agreement, the terms of which are set forth in the said 6th paragraph, and further avers upon her advice, information and belief, that certain parcels of land between W and Adams Streets Northwest on either side of the said First Street Northwest, were not parts of the restricted agreement.

Further with regard to the said 6th paragraph, this defendant sets forth that she is without knowledge as to the

occupancy of the respective properties by the plaintiffs as alleged, and therefore neither admits nor denies same, but should same become material, strict proof will be required.

7. This defendant is without knowledge as to the accuracy of the allegations of the 7th paragraph of the said complaint, and therefore neither admits nor denies same, but should the same become material, strict proof will be required.

8. This defendant admits the allegations of paragraph 8 of the complaint filed herein.

9. This defendant avers upon her information and belief that the signature of Francis H. Melick to the restrictive agreement referred to was not a proper execution of the said agreement as to the parcel of land involved by reason of the then ownership of the said property.

With respect to the balance of the said 9th paragraph, this defendant admits so much thereof as sets forth that by Deed dated February 15, 1944 and recorded as Instrument No. 4587 on February 17, 1944, one Jane Cook conveyed the said property to this defendant who moved into the said property on February 21, 1944. With respect to the remaining allegations of the said 9th paragraph, this defendant is without knowledge, and therefore neither admits nor denies same, but should the same become material, strict proof will be required.

9 10. Answering paragraph 10 of the complaint filed herein, this defendant sets forth upon her advice and belief that the allegations of the said paragraph are conclusions of law, which she is not called upon to answer.

Further answering, this defendant sets forth upon her advice and belief that the agreement upon which reliance is had by the plaintiffs is without force and effect for the reasons, among other things, that the purpose of the said agreement has been and is avoided and rendered ineffective in that the character of the neighborhood has changed since the signing of the said agreement in that the area originally

covenanted has largely changed from white to Negro occupancy up to the very threshold of the property here involved, and that this trend of occupancy is emphasized by sales already existing or awaiting consummation at the expiration of the respective covenant periods in the immediate area.

This defendant avers further in this regard upon her advice and belief that the agreement itself is ineffective and inoperative by reason of irregularities and discrepancies in the execution thereof. The defendant further sets forth that rather than a residential area, purported to be protected for white ownership and occupancy by the alleged agreement, the area itself and the properties here immediately involved are tenanted by renters as a part of commercial transactions of present owners inconsistent with the purposes of the aforesaid agreement.

This defendant further sets forth that the relief sought in this said cause would relatively, as against herself and the parties plaintiff, be grossly inequitable against her for the reason that the condition which the relief sought against her would create would, within a relatively short time, be non-existent by reason of the expiration of the aforesaid agreement and other similar agreements in the immediate vicinity and the present existence of circumstances which would make the renewals thereof impossible.

10 This defendant further sets forth that the enforcement of the said covenant or agreement would be void in that it attempts to deprive her and others so situated of property without due process of law; it abridges the privileges and immunities of citizens of the United States, and other persons within its jurisdiction of the equal protection of the law and is forbidden by the 5th, 13th and 14th Amendments to the Constitution of the United States and the laws enacted in aid and under the sanction of the 13th and 14th Amendments of the Constitution of the United States.

Further this defendant states that the said agreement, even in the absence of any substantial constitutional ques-

tion is contrary to the public policy of the United States as announced in its Statutes, decisions, common law, and public opinion.

This defendant further states that this agreement is, therefore, of such character that a court of equity will not lend its aid by enforcing it.

Now having fully answered, this defendant prays that the relief sought by the plaintiffs herein be denied.

CLARA I. MAYS.

COBB, HOWARD & HAYES,

Attorneys at Law,

613 F Street, N. W.

By: JAMES A. COBB

LEON A. RANSOME,

Attorney at Law,

1512 Girard Street, N. E.

RUSSELL MORRIS,

Attorney at Law,

611 F Street, N. W.

District of Columbia, ss:

Clara I. Mays, being first duly sworn, deposes and says that she has read the foregoing petition by her subscribed and knows the contents thereof, and that the same is true
 11 of her own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters she believes it to be true.

CLARA I. MAYS.

Suscribed and sworn to before me this 10th day of April, 1944.

SAMUEL E. LACY,

Notary Public, D. C.

(Seal)

* * * * *

12

Filed May 11, 1944

*Answer of Defendant Consolidated Properties, Inc. To
Complaint For Injunction*

1 and 2. The defendant, Consolidated Properties, Inc., admits the allegations of paragraphs 1 and 2 of the complaint filed herein.

3. This defendant admits the allegations of paragraph 3 of the said complaint.

4. This defendant is without knowledge as to the allegations of paragraph 4 and therefore neither admits nor denies the same, but should the same become material, demands strict proof thereof.

5. This defendant admits so much of the allegations contained in paragraph 5 as allege that the property owned by the defendant Clara I. Mays is located on the east side of First Street, Northwest, between W and Adams Streets Northwest. As to the remaining allegations of paragraph 5 this defendant is without knowledge, and therefore neither admits nor denies same, but should same become material, strict proof will be required.

6. This defendant denies the allegations of paragraph 6 of the complaint filed herein, and avers the fact to be upon its information and belief that all of the fee simple owners of properties on the east and west sides of said First
13 Street Northwest, between W and Adams Streets, Northwest, did not join in the execution of an agreement, the terms of which are set forth in the said 6th paragraph, and further avers upon its advice, information and belief, that certain parcels of land between W and Adams Streets Northwest on either side of the said First Street, Northwest, were not parts of the restricted agreement.

Further with regard to the said 6th paragraph, this defendant sets forth that it is without knowledge as to the occupancy of the respective properties by the plaintiffs as alleged, and therefore neither admits nor denies same, but should same become material, strict proof will be required.

7. This defendant is without knowledge as to the accuracy of the allegations of the 7th paragraph of the said complaint, and therefore neither admits nor denies same, but should the same become material, strict proof will be required.

8. This defendant neither admits nor denies the allegations of paragraph 8, as it does not have any knowledge upon which to answer paragraph 8.

9. The defendant avers upon its information and belief that the signature of Francis H. Melick to the restrictive agreement referred to was not a proper execution of the said agreement as to the parcel of land involved by reason of the then ownership of the said property.

With respect to the balance of said paragraph, this defendant admits so much thereof as sets forth that by Deed dated February 15, 1944, and recorded as instrument No. 4587, on February 17, 1944, one Jane Cook conveyed the said property to the defendant Clara I. Mays, who moved into the said property on February 21, 1944. The defendant denies that one Jane Cook is a straw person. With respect to the remaining allegations of the said 9th paragraph, this defendant admits receiving the said letter from the said Henry Gilligan.

10. Answering paragraph 10 of the complaint filed herein, this defendant sets forth upon its advice and belief that the allegations of the said paragraph are conclusions of law, which it is not called upon to answer.

Further answering, this defendant sets forth upon its advice and belief that the agreement upon which reliance is had by the plaintiffs is without force and effect for the reasons, among other things, that the purpose of the said agreement has been and is avoided and rendered ineffective in that the character of the neighborhood has changed since the signing of the said agreement in that the area originally covenanted has largely changed from white to Negro occupancy up to the very threshold of the property

here involved, and that this trend of occupancy is emphasized by sales already existing or awaiting consummation at the expiration of the respective covenant periods in the immediate area. This defendant further avers that the property in question cannot be sold to a white tenant inasmuch as it is strictly a rooming house area, and that the only market value attached to the said property can only be realized by the sale of this property to a colored person.

This defendant avers further in this regard upon its advice and belief that the agreement itself is ineffective and inoperative by reason of irregularities and discrepancies in the execution thereof. The defendant further sets forth that rather than a residential area, purported to be protected for white ownership and occupancy by the alleged agreement, the area itself and the properties here immediately involved are tenanted by renters as a part of commercial transactions of present owners inconsistent with the purposes of the aforesaid agreement.

This defendant further sets forth that the relief sought in this said cause would relatively, as against itself and the parties plaintiff, be grossly inequitable against it for the reason that the condition which the relief sought against her would create would, within a relatively short time, be non-existent by reason of the expiration of the aforesaid agreement and other similar agreements in the immediate vicinity and the present existence of circumstances
 15 which would make the renewals thereof impossible.

This defendant further sets forth that the enforcement of the said covenant or agreement would be void in that it attempts to deprive it and others so situated of property without due process of law; it abridges the privileges and immunities of citizens of the United States, and other persons within its jurisdiction of the equal protection of the law and is forbidden by the 5th, 13th, and 14th amendments to the Constitution of the United States and the laws enacted in aid and under the sanction of the 13th and 14th amendments of the Constitution of the United States.

Further this defendant states that the said agreement, even in the absence of any substantial constitutional question, is contrary to the public policy of the United States as announced in its Statutes, decisions, common law, and public opinion.

This defendant further states that this agreement is, therefore, of such character that a court of equity will not lend its aid by enforcing it.

Now having fully answered, this defendant prays that the relief sought by the plaintiffs herein be denied.

CONSOLIDATED PROPERTIES, INC.

By PETER T. STATHES,
Sec'ty-Treas.

HARRY BONNETT,
REUBEN BONNETT,
Attorneys at Law,
3211 Georgia Ave., N. W.,
Washington, D. C.

District of Columbia, ss:

Peter T. Stathes, being first duly sworn according to law, on oath deposes and says that he has read the foregoing petition by him subscribed and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief, and as to those matters alleged on information he believes them to be true.

PETER T. STATHES.

16 Subscribed and sworn to before me this 10th day
of May, 1944.

VIRGIL C. JUDSON,
Notary Public, D. C.

(Seal)

* * * * *

17

Filed May 11 1944

*Answer of Defendant Jane Cook to Complaint for
Injunction*

1 and 2. The defendant, Jane Cook, admits the allegations of paragraphs 1 and 2 of the complaint filed herein.

3. This defendant admits the allegations of paragraph 3 of the said complaint.

4. This defendant is without knowledge as to the allegations of paragraph 4 and therefore neither admits nor denies the same, but should the same become material, demands strict proof thereof.

5. This defendant admits so much of the allegations contained in paragraph 5 as allege that the property owned by the defendant, Clara I. Mays, is located on the east side of First Street, Northwest, between W and Adams Streets Northwest. As to the remaining allegations of paragraph 5 this defendant is without knowledge, and therefore neither admits nor denies same, but should same become material, strict proof will be required.

6. This defendant denies the allegations of paragraph 6 of the complaint filed herein, and avers the fact to be upon its information and belief that all of the fee simple owners of properties on the east and west sides of said First Street Northwest, between W and Adams Streets, Northwest, did not join in the execution of an agreement, the terms of which are set forth in the said 6th paragraph, and further avers upon her advice, information and belief, that certain parcels of land between W and Adams Streets Northwest on either side of the said First Street, Northwest, were not parts of the restricted agreement.

Further with regard to the said 6th paragraph, this defendant sets forth that she is without knowledge as to the occupancy of the respective properties by the plaintiffs as alleged, and therefore neither admits nor denies same, but should same become material, strict proof will be required.

7. This defendant is without knowledge as to the accuracy of the allegations of the 7th paragraph of the said com-

plaint, and therefore neither admits nor denies same, but should the same become material, strict proof will be required.

8. This defendant neither admits nor denies the allegations of paragraph 8, as it does not have any knowledge upon which to answer paragraph 8.

9. This defendant avers upon its information and belief that the signature of Francis H. Melick to the restrictive agreement referred to was not a proper execution of the said agreement as to the parcel of land involved by reason of the then ownership of the said property.

With respect to the balance of said paragraph, this defendant admits so much thereof as sets forth that by Deed dated February 15, 1944, and recorded as instrument No. 4587, on February 17, 1944, one Jane Cook conveyed the said property to the defendant Clara I. Mays, who moved into the said property on February 21, 1944. The defendant denies that she is a straw person. This defendant is without knowledge as to the remainder of paragraph 9 and therefore neither admits nor denies the same, but should it become material, will demand strict proof thereof.

10. Answering paragraph 10 of the complaint filed herein, this defendant sets forth upon her advice and belief that the allegations of the said paragraph are conclusions of law, which she is not called upon to answer.

19 Further answering, this defendant sets forth upon her advice and belief that the agreement upon which reliance is had by the plaintiffs is without force and effect for the reasons, among other things, that the purpose of the said agreement has been and is avoided and rendered ineffective in that the character of the neighborhood has changed since the signing of the said agreement in that the area originally covenanted has largely changed from white to Negro occupancy up to the very threshold of the property here involved, and that this trend of occupancy is emphasized by sales already existing or awaiting consummation at the expiration of the respective covenant periods in the immediate area. This defendant further avers that

the property in question cannot be sold to a white tenant inasmuch as it is strictly a rooming house area, and that the only market value attached to the said property can only be realized by the sale of this property to a colored person.

This defendant avers further in this regard upon her advice and belief that the agreement itself is ineffective and inoperative by reason of irregularities and discrepancies in the execution thereof. The defendant further sets forth that rather than a residential area, purported to be protected for white ownership and occupancy by the alleged agreement, the area itself and the properties here immediately involved are tenanted by renters as a part of commercial transactions of present owners inconsistent with the purposes of the aforesaid agreement.

This defendant further sets forth that the relief sought in this said cause would relatively, as against herself and the parties plaintiff, be grossly inequitable against it for the reason that the condition which the relief sought against her would create, within a relatively short time, be non-existent by reason of the expiration of the aforesaid agreement and other similar agreements in the immediate vicinity and the existence of circumstances which would make the renewals thereof impossible.

This defendant further sets forth that the enforcement of the said covenant or agreement would be void in
 20 that it attempts to deprive her and others so situated of property without due process of law; it abridges the privileges and immunities of citizens of the United States, and other persons within its jurisdiction of the equal protection of the law and is forbidden by the 5th, 13th and 14th amendments to the Constitution of the United States and the laws enacted in aid and under the sanction of the 13th and 14th amendments of the Constitution of the United States.

Further this defendant states that the said agreement, even in the absence of any substantial constitutional question, is contrary to the public policy of the United States

as announced in its Statutes, decisions, common law, and public opinion.

This defendant further states that this agreement is, therefore, of such character that a court of equity will not lend its aid by enforcing it.

Now having fully answered, this defendant prays that the relief sought by the plaintiffs herein be denied.

JANE COOK

HARRY BONNETT

REUBEN BONNETT

Attorneys at Law

3211 Georgie Ave., N. W.

Randolph 3131

DISTRICT OF COLUMBIA, ss:

Jane Cook, being first duly sworn according to law, on oath deposes and says that she has read the foregoing petition by her subscribed and knows the contents thereof, and that the same is true to the best of her knowledge, information and belief, and as to those matters alleged on information, she believes them to be true.

JANE COOK

Subscribed and sworn to before me this 10th day of May, 1944.

VIRGIL C. JUDSON,
Notary Public, D. C.

* * * * *

21

Filed May 12 1944

Pretrial Proceedings

Statement of Nature of Case:

This suit involves the validity of the restrictive covenants of the Agreement of September 1, 1925.

Otherwise, a summary of the issues is waived.

Stipulations: By agreement of counsel for the respective parties, present in Court, it is ordered that the subse-

quent course of this action shall be governed by the following stipulations unless modified by the Court to prevent manifest injustice:

The deed made May 25th, 1931, initialed by the Pre-Trial Justice, and property owners' agreement of Sept. 1, 1925, initialed by the Pre-Trial Justice, may be received in evidence without formal proof.

The several plats, initialed by the Pre-Trial Justice, may be received in evidence without formal proof but subject to check as to accuracy.

The certificate of the Lawyers Title Insurance Corporation dated May 4, 1944, initialed by the pre-Trial Justice, may be received in evidence without formal proof.

Two houses in the 2100 block of First St., N. W. which are under a similar restrictive agreement expiring Nov. 1, 1944 have been purchased by colored people recently but are not occupied; action is pending against these parties in the District Court.

22 Burgess v. Mays—C. A. 23,436

F. DICKINSON LETTS,
Pretrial Justice.

Dated May 12, 1944.

Remarks of Pretrial Justice for consideration of Trial Justice:

Attorneys authorized to act:

HENRY GILLIGAN

Plaintiff,

COBB, HOWARD AND HAYES

By JAMES A. COBB

RUSSELL MORRIS: BONNETT & BONNETT

Defendant.

COBB, HOWARD & HAYES

REUBEN BONNETT

* * * * *

Filed Jun 30 1944

Findings of Facts and Conclusions of Law

This is an action brought by William T. Burgess, Frances E. Burgess, H. P. Grumbrecht, Agnes B. Mularkey, Mary C. Carleton against Clara I. Mays, Jane Cook and Consolidated Properties, Incorporated to enjoin the selling, renting, leasing, transferring or conveying of certain real estate in the District of Columbia, to compel the defendant Clara I. Mays to vacate the same, and seeking a judgment declaring the conveyance of the real estate referred to, by the defendant Consolidated Properties, Inc. to Jane Cook, and by the said Jane Cook to the defendant Clara I. Mays, null and void.

Findings of Facts.

The parties are citizens of the United States residing in the District of Columbia, except Consolidated Properties, Inc., which is a corporation organized under the laws of the State of Delaware. All of the individuals named are persons of the White race except Clara I. Mays, who is a person of the Negro race.

The plaintiffs William T. Burgess and Frances E. Burgess are the owners in fee simple and the occupants of Lot 29, Square 3123, improved by 2209 First Street, N. W.; plaintiff H. P. Grumbrecht is the owner in fee simple and the occupant of Lot 30, Square 3123, improved by premises 2211 First Street, N. W., the plaintiffs, Agnes B. Mularkey and Mary C. Carleton, are the owners in fee simple and the occupants of Lot 35, Square 3123, improved by 2221 First Street, N. W.

The defendant Clara I. Mays is the owner and occupant of Lot 31, Square 3123, improved by 2213 First Street, N. W. Her immediate grantor was the defendant, Jane Cook, who received her title from Consolidated Properties, Inc. Jane Cook was only a "straw" party, the deed to her carrying no consideration, the sale being consummated by Peter T. Stathes, Secretary-Treasurer of Consolidated Proper-

ties, Inc. directly with defendant, Clara I. Mays, through Geneva K. Valentine, a Negro real estate dealer. Jane Cook is a sister of said Peter T. Stathes.

These properties, together with all other properties in the 2200 block of First Street (being lots 26 to 42, inclusive, Square 3123; and lots 11 to 25, inclusive, Square 3122) are included under the Restrictive Agreement dated September 1, 1925 for 21 years, as follows: (the pertinent paragraphs):

24 "Whereas the said parties hereto are all owners of real estate situated in the District of Columbia, and located on First Street, between W and Adams Streets, Northwest, both on the East and the West sides of said street, said property being parts of squares 3122 and 3123, as recorded in the Surveyor's Office of the District of Columbia; and

"Whereas the said parties hereto desire, for their mutual benefit, as well as for the best interests of the said community and neighborhood, to improve in any legitimate way and further the interests of said community and neighborhood;

"Now, Therefore, in consideration of the premises and the sum of five dollars each to the other in hand paid, the parties hereto do hereby mutually agree, promise and covenant, each with the other and for their respective heirs and assigns, that no part of the land now owned by the parties hereto, a more definite description of said property being given after the respective signatures hereto, shall ever be used or occupied by, or sold, conveyed, leased, rented or given to Negroes or any person or persons of the Negro race or blood. This covenant shall run with the land and bind the respective parties hereto, their heirs and assigns, for the period of twenty-one years from and after the date of these presents."

The defendant Clara I. Mays purchased the property in suit with actual as well as constructive notice of the Restrictive Agreement; the District Title Insurance Company by a Preliminary Report to her agent cited the restriction as to Negro ownership or occupancy in full; the purchase

settlement was made in the office of Geneva K. Valentine, the Negro real estate agent.

The area adjacent to the property here in question is residential in character, consisting of row houses, a few business houses and several churches. All of First Street, Northwest, on both sides, from Rhode Island Avenue north to Channing Street, consisting of six city blocks (Channing Street being the most northerly street developed) is occupied solely by persons of the White race, all of said blocks being under Restrictive Agreements or deed covenants prohibiting the ownership, use or occupancy by Negroes. An action is pending covering 2 lots in the 2100 block of First Street, N. W., the Agreement expiring November 1, 1944. All of the intersecting streets from First Street eastward to Lincoln Road, south to the North side of T Street, and west to First Street, Northwest, including also North Capitol Street, are likewise solely occupied by persons of the White race and under similar Restrictive Agreements or deed covenants;—a total of approximately one thousand homes, churches and business properties.

The area west of First Street and Rhode Island Avenue, N. W. is occupied almost exclusively by persons of the Negro race or blood, with the exception of Bryant Street, which is occupied, between First and Second Streets, N. W., by about two-thirds of the block immediately west of First Street with persons of the White race under deed covenants, the remaining one-third by Negroes under
 25 no restrictions as to color.

The property in suit was owned, on September 1, 1925, the date of the Restrictive Agreement, by Frances H. Melick, who alone signed the Agreement. The wife of Frances H. Melick was living on said date, dying thereafter on September 19, 1925; the notarial jurat is dated September 25, 1925, and indicates that said Frances H. Melick was a widower at the time of acknowledgment.

The acknowledgment of Mary C. Carleton, joint owner with Agnes B. Mularkey of 2221 First Street, Northwest,

was defective, being in error as to date of the Restrictive Agreement and acknowledged prior to September 1, 1925. Mary C. Carleton and Agnes B. Mularkey were plaintiffs in the case.

Conclusions of Law.

With respect to the contentions that Restrictive Agreements of the kind in suit constitute an unlawful restraint on alienation; (2) that they attempt to deprive the defendant, Mays, and others so situated of property without due process of law; (3) that they abridge the privileges and immunities of citizens of the United States, and other persons within its jurisdiction, of the equal protection of the law and is forbidden by the 5th, 13th and 14th Amendments to the Constitution of the United States and the laws enacted thereunder; (4) that they are contrary to public policy of the United States; and (5th) that they are of such character that a court of equity will not lend its aid to their enforcement;—the validity of covenants and agreements of this nature have been uniformly upheld in this jurisdiction. It is axiomatic that such restrictions constitute valid and solemn contracts which ordinarily will not be lightly set aside. The Restrictive Agreement in suit is a valid and solemn contract.

DANIEL W. O'DONOGHUE,
Justice.

June 30, 1944.

* * * * *

26

Filed June 30, 1944.

Judgment for Permanent Injunction.

THIS CAUSE came on to be heard, and thereupon, upon consideration thereof, and it appearing to the Court that the Restrictive Agreement, dated September 1, 1925, and running with the land for twenty-one years from and after said date, binding Lots 26 to 42, inclusive, in Square 3123,

and lots 11 to 25, inclusive, in Square 3122, providing that no part of the said land shall ever be used or occupied by, or sold, conveyed, leased, rented or given to Negroes, or any person or persons of the Negro race or blood, said Agreement being duly recorded in the Land Records of the District of Columbia on October 6, 1925 (liber 5584, folio 377, etc.), is in full force and effect; and it further appearing to the Court that the defendant, Clara I. Mays, is a Negro, and is the owner and occupant of Lot 31 in Square 3123, improved by premises No. 2213 First Street, N. W.; and that the defendant, Jane Cook, was only a "straw" party; and that the defendant, Consolidated Properties, Incorporated, was the actual owner of record which sold and conveyed said land and premises to the defendant, Mays, in violation of the provisions of said Agreement; and that the defendant Mays owns and occupied said land and premises in violation of the provisions of said Agreement, it is, by the Court, this 30th day of June, 1944,

ADJUDGED, that Clara I. Mays be, and she is hereby, permanently enjoined from owning, occupying, selling, leasing, transferring, giving away or conveying the land known as Lot 31 in Square 3123, and the improvements thereon, in the District of Columbia; and it is further

ADJUDGED, that Consolidated Properties, Incorporated, be and it is hereby enjoined from selling, leasing, transferring, giving or conveying the land known as Lot 31 in Square 3123, and the improvements thereon, 27 in the District of Columbia, District of Columbia, to, or allowing the same to be used or occupied by, any Negro or color person; and it is further

ADJUDGED, that the deed dated February 15th, 1944, and recorded February 17th, 1944, as Instrument No. 4587 among the Land Records of the District of Columbia, from Jane Cook to Clara I. Mays; and the deed dated February 10, 1944, and recorded February 11, 1944 as Instrument No. 4024 among the Land Records of the District of Columbia, from Consolidated Properties, Incorporated to

Jane Cook, be and they are, and each of them is, declared null and void and of no effect, and the title to said Lot 31 in Square 3123, with improvements thereon, is hereby declared to be in Consolidated Properties, Incorporated, subject to the provisions of the aforesaid Restrictive Agreement; and it is further

ADJUDGED, that Clara I. Mays be, and she hereby is, ordered to remove herself and all of her personal effects from said land and premises within sixty days from the date hereof; and it is further

ADJUDGED, that taxable costs be assessed against the defendants, and each of them.

DANIEL W. O'DONOGHUE,
Justice.

* * * * *

28

Filed July 5, 1944.

Notice of Appeal.

Notice is hereby given this 5th day of July, 1944, that Clara I. Mays hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 30th day of June, 1944 in favor of plaintiffs against said Clara I. Mays.

GEORGE E. C. HAYES,
Attorney for
CLARA I. MAYS.

Henry Gilligan, Esq.,
Washington Loan & Trust Co.,
Washington, D. C.

* * * * *

29

Filed July 18, 1944.

Notice of Appeal.

Notice is hereby given this 18th day of July, 1944, that Consolidated Properties Inc. and Jane Cook hereby appeals to the United States Court of Appeals for the District of

Columbia from the judgment of this Court entered on the 30th day of June, 1944 in favor of William T. Burgess et al, the plaintiffs, against said Clara I. Mays and the Consolidated Properties Inc., and all the defendants.

REUBEN BONNETT

Attorney for
CONSOLIDATED PROP. INC.,
and JANE COOK

* * * * *

30

Filed July 17, 1944.

*Statement of Points on Appeal on Behalf of
Defendant Clara I. Mays.*

The appellant Clara I. Mays intends to rely upon the following Point on the appeal of this cause:

1. The covenant as referred to in the complaint is void and of no effect, as contrary to public policy.

2. The covenant as referred to in the complaint has been waived and abandoned by conduct of property owners involved since the date of the making thereof, and by changed circumstances in the area covered thereby.

3. The covenant as referred to is void in that it attempts to deprive the appellant of property without due process of law; it abridges the privileges and immunities of this appellant of the equal protection of the law and is forbidden by the 5th, 13th and 14th Amendments to the Constitution of the United States and the laws enacted in aid and under the sanction of the 13th and 14th Amendments to the Constitution of the United States.

4. The covenant is of such character that a Court of equity will not lend its aid by enforcing it.

COBB, HOWARD & HAYES

Attorneys for Defendant

Clara I. Mays

613 F Street, N. W.

By: JAMES A. COBB

* * * * *

31

Filed July 19, 1944.

Statement of Evidence on Behalf of Appellants.

On behalf of the plaintiffs in this cause testimony was offered by one H. P. Grumbrecht, by one William T. Burgess, and one Henry K. Murphy, tending to show that real estate owned by the plaintiffs and all other property owners on the east and west sides of First Street Northwest between W and Adams Streets was under a covenant, the pertinent paragraphs of which were set forth in the Complaint and which was entered into about September 21, 1925, to run for a period of twenty-one years and providing, among other things, that none of the property in question should ever be used or occupied by or sold, conveyed, leased, rented or given to Negroes, or to any person or persons of the Negro race or blood.

The witness Murphy testified further that he was, and had been since, to wit, 1923, the executive secretary of the Citizen's Association where the property here in question was located; that he formerly lived on Flagler Place, but had moved to premises 42 Rhode Island Avenue, Northwest, where he has lived for a considerable period of time; that the area, including both sides of First Street here invlved and east to Lincoln Road south to Rhode Island Avenue, was occupied entirely by persons of the white race; that west of First Street on U Street there were three or four houses on both sides of the streets which were covered by a covenant but which had been given over to colored occupancy without protest and which were at present occupied by colored persons. The witness further testified that all the property on U Street west of First Street, with the exception of premises 101 U Street, Northwest, and the store opposite same on U Street, were occupied by colored; that on Adams and Bryant Streets

32 the same were respectively three-fourths protected
by land covenants, the remaining percentage occu-
pied by colored persons.

Witness Murphy further testified the record disclosed that the covenant in the 2100 Block of First Street expires on, to wit November 1, 1944, and that two of same, namely, premises 2118 and 2121 First Street, Northwest, were at present owned by colored, but that there were suits pending, protesting against such ownership.

The witness Grumbrecht, on cross-examination, testified that defendant Clara I. Mays was his next door neighbor, and that he had no recollection about saying anything about the covenant or having made any complaint against Mrs. Mays.

On behalf of the defendant Clara I. Mays, Mr. Stathes was called; he identified himself as the secretary-treasurer of the defendant Consolidated Properties, Incorporated, and testified that, relying on advice of counsel as to the pending trend of change of neighborhood from white to colored in this immediate vicinity, he had bought and sold several properties in this immediate area, among which was this particular property in question; that the value of the property in this immediate locality, and the particular property here involved, was much greater for prospective sales to colored than it was to white occupancy, the difference in this particular case being represented by the difference between \$7500.00 as offered by white and \$9950.00, the sale price to defendant Mays.

This witness further testified that the block in question was now largely composed of rooming houses and apartment houses, and was occupied only to a small extent by owners living in their own property for family purposes alone.

On behalf of the defendant Clara I. Mays, Abraham Draisner was called and testified that he was in the real estate business, having had eight years experience, part of which was while in the government service, and who likewise testified that white purchasers in this locality, in his opinion, were not as easily obtainable as was occupancy by colored, and that the difference in value as obtainable, in his opinion, between a white

prospective purchaser and a colored purchaser was the difference approximately between \$7500.00 and \$10,000.00.

Further testimony was had on behalf of the defendant in the person of Mrs. Geneva K. Valentine, the agent who has sold the property in this case, and Mrs. Clara I. Mays, purchaser. Mrs. Valentine testified that she was a real estate broker in this city, her clientele being both white and colored, and that she was President of the colored real estate association in the District of Columbia; that in her opinion the trend in this neighborhood and in the 2200 Block of First Street, Northwest, was toward colored ownership and occupancy, and stated that she, aside from the sale in the instant case, had two other properties in the 2100 Block of First Street, Northwest, where transfers had been made to persons of the Negro race or blood and that the covenant in that block (2100) expired on November 1, 1944, at which time it was anticipated that colored occupancy would be realized. She further testified there were other or others who owned property covenanted by this particular agreement who were desirous of selling to colored and had approached her to that effect. When, on cross-examination, she was asked to give names, she stated she preferred not to do so as the matter was confidential, but under the ruling of the Court she testified, giving the name of an individual living in that block who was desirous of selling to colored and who had approached her to that effect. She further testified the property was vacant at the time of the sale and in this connection, the witness Stathes testified that the property had been vacant for some time.

The defendant Clara I. Mays testified in her own behalf that she was employed in the government service and had been for several years; that her family consisted of eight persons, three sisters who are employed in the City of Washington, District of Columbia, and four nieces, all of whom are of school age and who are attending school;

that prior to the purchase of this property she and her sisters were renting and that the property occupied by her and her family was sold and, under a Court Order, she was placed in the streets and that her furniture was stored; that she and her sisters and nieces roomed at different places until the purchase of this particular house. That at the time of the purchase she consulted counsel at the instance of the seller and agent and was told that, in his opinion, owing to the change in neighborhood and the relatively short duration of the covenant in the block in which she was purchasing and the rather imminent duration of the covenant in the next block, she was not running any risk in purchasing and occupying the property.

Defendant Mays testified further that she accepted this proposition because of an absolute lack of other available properties.

COBB, HOWARD & HAYES

Attorneys for Defendant,

Clara I. Mays

613 F Street, N. W.

By: JAMES A. COBB.

REUBEN BONNETT

Attorney for Defendant

Consolidated Properties, Inc.

3211 Georgia Ave., N. W.

35

Filed August 4, 1944.

Statement of Evidence on Behalf of Appellees.

In addition to the evidence submitted on behalf of the appellants on appeal in the above cause Appellees beg to submit the following:

The witness Henry K. Murphy also testified that in the territory including First Street, N. W. from T Street to the Soldiers' Home Grounds and all to the east thereof to Lincoln Road there were approximately 1000 homes, churches, places of business and schools, all under either

deed covenants or restrictive agreements on the Negro question, and all occupied by persons of the white race and about eighty per cent owner-occupied.

The witness Grumbrecht also testified that he personally had circulated the Restrictive Agreement in the 2200 block of First Street, N. W., and had secured most of the owners' signatures; that approximately eighteen owners occupied their homes in this block at this time; that he had made no complaint to defendant Mays about her being colored when he volunteered to make some repair for her.

The witness Burgess testified he and his wife had bought their home at 2209 First Street, N. W., after investigating and finding, in the spring of 1931, that it was protected by the Restrictive Agreement in suit.

Witness Dudley L. Meade, a Notary Public and also note teller at the Second National Bank, testified that he took the acknowledgment of Jane Cook to the deed to defendant Mays, that the second trust note from defendant Mays to Jane Cook was endorsed by the latter in his presence and deposited with him for collection for Consolidated Properties, Inc., that Jane Cook was a "straw" party.

Witness Mabel Marsili testified she and her husband purchased 2217 First Street, N. W. about two years ago for \$9,500 and had spent about \$1,800 in fixing it up, 36 relying upon the Restrictive Agreement.

The witness Peter T. Stathes, on cross-examination, admitted Jane Cook was merely a "straw" party, and that Consolidated Properties, Inc. was the real owner of 2213 First Street, N. W., occupied by defendant Mays.

The witness Draisner, responding to a question by the Court, stated he had left the Government service about a year ago.

The defendant, Mays, on cross-examination, admitted she was under actual as well as constructive notice of the restrictive agreement binding the property in suit.

HENRY GILLIGAN,
Attorney for Plaintiffs.

APPELLEES' BRIEF

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

No. 8831

FILED NOV 6 1944

CLARA I. MAYS, *et al.*, *Appellants*

Joseph W. Stewart
CLERK

v.

WILLIAM T. BURGESS, FRANCES E. BURGESS,
H. P. GRUMBRECHT, AGNES B. MULARKEY,
MARY C. CARLETON, *Appellees*

and

JANE COOK, CONSOLIDATED PROPERTIES, INC.,
Appellants

v.

WILLIAM T. BURGESS, FRANCES E. BURGESS,
H. P. GRUMBRECHT, AGNES B. MULARKEY,
MARY C. CARLETON, *Appellees*

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

HENRY GILLIGAN

Attorney for Appellees

Washington Loan & Trust Building
Washington, D. C.

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 8831

CLARA I. MAYS, CONSOLIDATED PROPERTIES,
INC., *Appellants*

vs.

WILLIAM T. BURGESS, FRANCES E. BURGESS,
H. P. GRUMBRECHT, AGNES B. MULARKEY,
MARY C. CARLETON, *Appellees*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

Statement of the Case.

Appellees are in general accord with the Statement of the Case by appellants, with the following additions: Witness Murphy testified that in the territory including First Street, N. W. from T Street to the Soldiers' Home Grounds and all to the east thereof to Lincoln Road there were approximately 1000 homes, churches, places of business and schools, all under either deed covenants or restrictive agreements on the Negro question, and all occupied by persons of the White race and about 80% owner-occupied. (App. 33, 34.) Plaintiff Grumbrecht had circulated the

Restrictive Agreement and secured most of the owners' signatures; about 18 owners now occupy their homes in the 2200 block. Plaintiff Burgess testified he and his wife had bought their home at 2209 First Street, N. W. in the spring of 1931 after investigating and finding it protected by the Restrictive Agreement in suit. Witness Mabel Marsili testified she and her husband had bought 2217 First Street, N. W. for \$9,500 about two years ago, relying upon the Restrictive Agreement, and had spent about \$1,800 in fixing it up. Witness Dudley L. Meade, a Notary Public and also note teller at the Second National Bank, testified that Jane Cook acknowledged the deed from herself to appellant Mays before him, endorsed the second trust note, which was deposited with him for collection for Consolidated Properties, Inc., Jane Cook being a "straw" party; Peter T. Stathes, Secretary-Treasurer of the appellant, Consolidated Properties, Inc., admitting under cross-examination that Jane Cook (his sister) was a "straw" party, the real owner being the corporation. The appellant Mays, a Negro, admitted she was under actual as well as constructive notice of the Restrictive Agreement.

Summary of the Argument.

1. The Restrictive Agreement is valid and enforceable in equity.
2. The Restrictive Agreement is designed to protect the properties to which it applies and is enforceable upon breach against persons taking with notice.
3. The Restrictive Agreement does not constitute an unlawful restraint on alienation.
4. The Restrictive Agreement is not in violation of the Constitution of the United States or against public policy.

Argument.

1. The restrictive agreement is valid and enforceable in equity.

The Restrictive Agreement in this case is completely identical with that upheld by this Court in *Corrigan et al. v. Buckley*, 55 App. D. C. 30 and by the Supreme Court of the United States in 271 U. S. 323, 70 L. Ed. 969. See also:

Torrey v. Wolfes, 56 App. D. C. 4, 6 Fed. (2d) 702.

Cornish v. O'Donoghue, 58 App. D. C. 359, 30 Fed. (2d) 983;

Writ of Certiorari denied, 279 U. S. 871, 73 L. Ed. 1007.

Russell v. Wallace, 58 App. D. C. 357, 30 Fed. (2d) 981;

Writ of Certiorari denied, 279 U. S. 871, 73 L. Ed. 1007.

Grady v. Garland, 67 App. D. C. 73, 89 Fed. (2d) 817.

Hundley v. Gorewitz, 77 U. S. App. D. C. 48, 132 Fed. (2d) 23.

In the *Hundley v. Gorewitz* case (*supra*) decided December 14, 1942, the Court says:

"In view of the consistent adjudications in similar cases, it must now be conceded that the settled law in this jurisdiction is that such covenants as this are valid and enforceable in equity by way of injunction."

2. The Restrictive Agreement is designed to protect the properties to which it applies and is enforceable upon breach against persons taking with notice.

The record in this case discloses that every property in the 2200 Block of First Street, N. W. is included under the Restrictive Agreement, and the defendant, Mays, took

title with actual as well as constructive notice of the Agreement. Plaintiffs call the Court's attention to the fact that (quoting Appellant's brief, pp. 10-11) Negroes, "anticipating the expiration of the restrictive agreement" (in the 2100 Block of First Street, N. W.), purchased 2118 and 2121 First Street, N. W., "said properties being at the present time the subjects of pending actions in the District Court." No Negroes occupy any property in the 2100 Block of First Street, or in any block of First Street from T Street north to the Soldiers' Home Grounds, nor any properties to the east to Lincoln Road, a community of over 1000 homes and churches under perpetual deed covenants or restrictive agreements. The neighborhood west of the properties abutting on the west side of First Street is and has been for many years largely owned and occupied by Negroes.

The attempt of the defendants to show a higher potential market for properties in the 2200 block of First Street for Negroes than for Whites is frustrated by the fact that the house at 2217 First Street, N. W. the second property above that in suit—was purchased within two years by the present White owners for \$9,500, \$1,800 in addition having been spent by them in improvements.

Covenants restricting the use and ownership of property by Negroes are enforceable as to the properties to which they apply without regard to changes in surrounding territory.

Grady vs. Garland, 67 App. D. C. 73, 89 Fed. (2d) 817.

The purpose of such Restrictive Agreements is to protect the owners who execute them, and those who purchase relying on them and subject themselves to them. If this were otherwise all that would be necessary to defeat the Agreement would be the moving in of a few Negroes in the immediate neighborhood. The enforceability of contractual rights would be utterly defeated under such cir-

cumstances, and the owners of property in the restricted area would be required to stand idly by while real estate speculators jockey in a Negro family or two. This is exactly what appellants' argument urges on a court of equity. They would use the illegal purchase of two properties in an adjoining, restricted block as a wedge to void another Restrictive Agreement on an adjoining block. This seems to be the only basis for appellants' argument, for insofar as change of neighborhood is concerned, the evidence and the plat show conclusively that the entire immediate neighborhood has been preserved as a residential section for persons of the White race.

Hundley v. Gorewitz, 77 App. D. C. 48 and cases therein cited.

In Meade v. Dennistone, 196 A. 330, the Maryland Court of Appeals sustained a covenant against use or occupancy of property by Negroes, although in the immediate block one of the properties was already occupied by Negroes, as well as intersecting streets. The Court says at page 1236 of 114 A. L. R., passing on this case,

"The defendants contend that the reasons for the agreement no longer obtain, that is, that the character of the neighborhood has so changed as to make the agreement ineffectual to accomplish its purpose, 'by reason of the large number of colored people now occupying properties close to the 2200 block of Barclay Street (Baltimore), No. 2238 Barclay Street is occupied by colored people, and two intersecting streets are largely populated by them.' No. 2238, which is at the corner of Twenty-third Street, is the only house on Barclay Street, with the exception of the house, No. 2227, now occupied by the defendant Meade in which colored people reside. This does not show such a change in the neighborhood as to nullify the agreement and render it useless. If there had been such a change, and as a result property became untenanted and unmarketable, equity might relieve the parties of the burden of their agreement."

3. The Restrictive Agreement does not constitute an unlawful restraint on alienation.

Contrary to appellants' statement that this question has never been "critically" examined by our Courts, an examination of the briefs in the cases of *Cornish v. O'Donoghue, supra*, and *Torrey v. Wolfes, supra*, as well as those in the case of *Corrigan v. Buckley, supra*, indicates complete presentation of the point.

The question was settled in *Cowell v. Colorado Springs Co.*, 100 U. S. 55, 25 L. Ed. 547, involving the validity of a covenant to the effect that intoxicating liquors should never be sold on the premises. Mr. Justice Field, delivering the unanimous opinion of the Court, and in answer to the contention that the condition was repugnant to the estate granted, says:

"But the answer is that the owner of property has a right to dispose of it with a limited restriction on its use, however much the restriction may affect the value or the nature of the estate. Repugnant conditions are those which tend to the utter subversion of the estate, such as prohibit entirely the alienation or use of the property. Conditions which prohibit its alienation to particular persons or for a limited period, or its subjection to particular uses, are not subversive of the estate; they do not destroy or limit its alienable or inheritable character. *Sheppard's Touchstone*, 129, 131. The reports are full of cases where conditions imposing restrictions upon the uses to which property conveyed in fee may be subjected have been upheld. In this way slaughter-houses, soap-factories, distilleries, livery-stables, tanneries and machine-shops have, in a multitude of instances, been excluded from particular localities, which, thus freed from unpleasant sights, noxious vapors, or disturbing noises, have become desirable as places for residence of families. To hold that conditions for their exclusion from premises conveyed are inoperative, would defeat numerous arrangements in our large cities for the health and comfort of whole neighborhoods.

"The condition in the deed of the plaintiff against the manufacture or the sale of intoxicating liquors as a beverage at any place of public resort on the premises, was not subversive of the estate conveyed. It left the estate alienable and inheritable, and free to be subjected to other uses."

In *Potter v. Couch*, 141 U. S. 296, 315, the Court had occasion indirectly to consider the same question. Appellants misquote the language of the Court in this case on pages 19-20 of their brief. In order to indicate the extent of the misquotation, there is enclosed in brackets the matter which appellants have inserted in their supposed quotation which does not appear in the official report, and there is printed in blackface type the matter which does appear in the official report and which is omitted from the quotation in appellants. brief:

"But the right of alienation is an inherent and inseparable quality of an estate in fee simple. In a devise of land in fee simple, therefore, a condition against all alienation is void, because repugnant to the estate devised. Lit. Sec. 360; Co. Lit. 206b, 223a; 4 Kent Com. 131; *McDonough v. Murdock*, 15 How. 367, 373, 412. For the same reason, a limitation over, in the case the first devisees shall alien, is equally void, whether the estate be legal or equitable. *Howard v. Carusi*, 109 U. S. 725; *Ware v. Cann*, 10 V. & C. 433; *Shaw v. Ford*, 7 Ch. D., 669; *In re Dugdale*, 38 Ch. D., 176; *Corbett v. Corbett*, 13 P. D., 136; *Steib v. Whitehead*, 111 Illinois, 247, 251; *Kelly v. Meins*, 135 Mass., 231, and cases there cited. And on principle, and according to the weight of authority (notwithstanding opposing dicta in *Cowell v. Springs Co.*, 100 U. S., 55, 57, and in other books), a restriction, whether by way of condition or of devise over, **not forbidding alienation to particular persons or for particular purposes only, but against any and all alienation whatever during a limited time**, of an estate in fee, is likewise void, as repugnant to the estate devised to the first taker, by depriving him during that time of the inherent power of alienation. *Roosevelt v. Thurman*, 1 Johns, Ch. 220; *Mandlebaum v. McDonell*, 29 Mich., 77; *Anderson v. Cary*, 36 Ohio St., 506; *Twitty v. Camp*, Phil. Eq. (No. Car.) 61; *In re Rosher*, 26 Ch. D., 801."

These changes are not immaterial. They entirely alter the effect of the opinion. They tend to indicate that the Supreme Court characterized statements in *Cowell v. Colorado Springs Co.* as dicta when it did not, and the language is omitted which exactly describes this restrictive covenant, namely: one forbidding alienation to particular persons, and by which the Court indicated that such a restriction was good.

This serious misquotation appeared in the appellants' brief in this Court in *Corrigan v. Buckley*, p. 32, and again in their brief in this Court in *Cornish v. O'Donoghue, et al.*, p. 12, in both cases attention being called to it in appellees' briefs and in argument at the bar of this Court. Again it is repeated.

The above statement, as it appears in the official report, shows that the decision in *Cowell v. Colorado Springs Co.* was recognized and impliedly affirmed. The language further points out very clearly the distinction upon which we rely, namely, that the restriction upon the right of alienation forbidding alienation only to a particular class of persons and not entirely suspending the right, is valid and enforceable.

The true test of whether restrictions or conditions are void as a restraint on alienation is whether the restrictions imposed restraints ALL alienation. There is a clear distinction between restrictions against ALL alienation and restrictions against alienation to PARTICULAR PERSONS or for PARTICULAR PURPOSES. Clearly, the covenant restrictions in the present case do not forbid *all* alienation; but, rather, the owner is free to sell his property at any and all times to any and all persons, except those of the excluded race. He is free to transfer a complete fee simple estate subject, however, to a restriction in the nature of an easement or incorporeal hereditament. *Castleman v. Avignone*, 56 App. D. C. 253, 12 Fed. (2d) 326.

In the cases cited by appellants on this point the courts' conclusions are not supported by their reasoning and cases cited. In *Porter v. Barrett* (233 Mich. 373, 206 N. W. 532) the Court relied entirely on cases holding devises in fee subject to conditions to be void. The Court relies on *Mandlebaum v. McDonell* (29 Mich. 78, 18 Am. Rep. 61), which held "that a condition or restriction which would suspend all power of alienation for a single day is inconsistent with the estate granted, unreasonable, and void." In *White v. White* (108 W. Va. 128, 150 S. E. 531), cited by appellants, the Court, after reviewing a number of cases involving devises, quoted from the *Mandlebaum* and *Porter* cases as the leading cases on the point. While the *White* case reaches the conclusion that the covenant is an unlawful restraint on alienation as being repugnant to a fee simple estate, the reasoning of the Court is based on the proposition that general restraints on alienation, or restraints on *all* alienation, are void. The Restrictive Agreement in the present case does not restrain *all* alienation, nor is there any general restraint imposed.

Appellants seem to admit, and all decisions cited agree, that restraints on *use* are valid, but contend that restraints on *ownership* are not. They argue that Negroes cannot acquire homes in which to live, and that because of restrictions Negroes must live in traditionally Negro settled areas. This is inconsistent. Do Negroes wish to acquire property without the right of use? If so, the Negro investor must rent to White tenants; this certainly will not make for more Negro housing and the property will not increase in value.

Restrictions on use have been uniformly declared valid throughout the country. The hair-splitting reasoning advanced by appellants, and used in the state cases cited by them, as to restraints on alienation has not been employed in this District. This point has been reviewed by this

Court on previous occasions and it has been held consistently that the restrictive covenant here involved does not constitute an undue restraint on alienation.

4. The Restrictive Agreement is not violative of the Constitution of the United States or against public policy.

Appellants' brief on this point seems to present two contentions: First, that restrictions of the type here involved, whether by covenant or agreement and whether for an unlimited or limited period of time, are repugnant to the Constitution of the United States; and second, that, even if such restrictions are not unconstitutional, they are against public policy.

In urging that the Constitution prohibits such restrictions appellants cite and rely on numerous cases dealing with the validity of State statutes and laws enacted by some political subdivision of a State or of the Federal Government. Not one of these cases is in point. The Constitutional limitations directed to the Federal Government (13th Amendment) and to the States (14th Amendment) forbidding deprivation of property, life or liberty without due process of law, or denial of the equal protection of the law, are directed solely to the action of government—local, state or federal. They do not purport to inhibit actions of individuals in respect to their property. Appellants ask this Court to examine the “fundamental” rights presented. Clearly the *fundamental* right is the right of individuals to contract in respect to their property—a right guaranteed to them by the Constitution. Appellants would have this Court destroy for all time this fundamental right—this right of contract relating to one's own property; so that, as they view it, a temporary, wartime housing shortage in the District of Columbia may be relieved. They depart from *fundamentals* when

they present such shallow reasoning for this Court to reverse a long line of decisions on this subject, consistently and unequivocally holding that "it must now be conceded that the settled law in this jurisdiction is that such covenants as this are valid and enforceable in equity, by way of injunction."

Hundley v. Gorewitz, *supra*, decided December 14, 1942.

In the opinion of this Court, written by Chief Justice Groner, the case of Corrigan v. Buckley, *Supra*, is cited following the above quotation. An examination of the briefs and record in that case will reveal that appellant therein urged, in almost identical language, the reasons now advanced by the present appellants for a "re-examination" of the question.

The language of this Court in Corrigan v. Buckley, *Supra*, at page 31, is as applicable to the present case as it was in that case, in 1924:

"Appellant seems to have misconceived the real question here involved. We are not dealing with the validity of a statute, or municipal law, or ordinance; nor are we concerned with the right of a negro to acquire, own, and use property; nor are we confronted with any pre-existing rights which are affected by the covenant here in question. The sole issue is the power of a number of landowners to execute and record a covenant running with the land, by which they bind themselves, their heirs and assigns, during a period of 21 years, to prevent any of the land described in the covenant from being sold, leased to, or occupied by negroes.

"The constitutional right of a negro to acquire, own, and occupy property does not carry with it the constitutional power to compel sale and conveyance to him of any particular private property. The individual citizen, whether he be black or white, may refuse to sell or lease his property to any particular individual or class of individuals. The state alone possesses the power to compel a sale or taking of private property, and that only for public use. The power

of these property owners to exclude one class of citizens implies the power of the other class to exercise the same prerogative over property which they may own. What is denied one class may be denied the other. There is, therefore, no discrimination within the civil rights clauses of the Constitution. Such a covenant is enforceable, not only against a member of the excluded race, but between the parties to the agreement."

Appellants lay great stress on the case of *Buchanan v. Warley*, 245 U. S. 60, 62 L. ed. 149, a Kentucky case. There appears to be no need to do more than quote the portion of the opinion of the Supreme Court conceded by appellants to state the issue, and observe that reliance on this case makes it obvious that appellants have "misconceived the real question here involved."

"The concrete question here is: May the occupancy, and, necessarily, the purchase and sale of property of which occupancy is an incident, *be inhibited by the State, or by one of its municipalities*, solely because of the color of the proposed occupant of the premises?" (Italics supplied).

Appellants urge that the courts cannot enforce such restrictions, because the judiciary is a branch of government. This is not new. In 1924 this proposition was urged in the *Corrigan-Buckley* case, *Supra*, and as late as 1942 the appellants in *Hundley vs. Gorewitz* (*Supra*) make the same contention. On both occasions the point, although urged strongly, was ignored by the Court.

While it may be argued that courts will not recognize or enforce contracts against public policy, in the absence of such objection the courts are the only place where law abiding citizens may obtain equal protection of the laws and save themselves from being deprived of their property without due process of law. This is exactly what appellees here did when they filed this suit to enforce their contract.

Appellants argue that the agreement here sought to be enforced is against public policy. Neither is this a novel

question. As early as 1924 and consistently on numerous occasions since, and as late as 1942, this Court has held such restrictions not violative of public policy. What was said in 1924 by this Court in the *Corrigan-Buckley* case (*Supra*) is as sound today as then:

"It follows that the segregation of the races, whether by statute or private agreement, where the method adopted does not amount to the denial of fundamental constitutional rights, cannot be held to be against public policy. Nor can the social equality of the races be attained, either by legislation or by the forceable assertion of assumed rights. As was said in *People v. Gallagher*, 93 N. Y. 438, 448 (45 Am. Rep. 232):

'This end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it is organized, and performed all of the functions respecting social advantages with which it is endowed.' "

Appellants urge that not only is a restrictive agreement of the kind involved here invalid for the assigned reasons, but that property owners, attempting "in any legitimate way" to secure their property rights, are guilty of conspiracy "to injure, oppress, threaten or intimidate" the Negro appellant. They cite Section 51, Title 18, of the U. S. Code as authority. At most, reference to this criminal statute can be urged in support of the claim of appellants that such restrictive agreements are repugnant to the Constitution and violative of any statutes enacted to implement constitutional rights.

In *Corrigan v. Buckley* (*Supra*) at page 32, this Court held:

"Defendant claims protection under certain legislation of Congress. As suggested in the opinion of the learned trial Justice, this legislation was enacted to carry into effect the provisions of the Constitution.

The statutes, therefore, can afford no more protection than the Constitution itself. If, therefore, there is no infringement of defendant's rights under the Constitution, there can be none under the statutes."

On appeal to the Supreme Court of the United States, that Court in an opinion treating exhaustively with the same contentions now urged, stated: (Corrigan v. Buckley, 217 U. S. 323, 70 L. Ed. 969)

"* * * The only question raised as to these statutes under the pleadings was the assertion in the motion interposed by the defendant, Curtis, that the indenture is void in that it is forbidden by the laws enacted in aid and under the sanction of the Thirteenth and Fourteenth Amendments. Assuming that this contention drew in question the 'construction' of these statutes, as distinguished from their 'application', it is obvious, upon their face, that while they provide, *inter alia*, that all persons and citizens shall have equal right with White citizens to make contracts and acquire property, they, like the Constitutional Amendment under whose sanction they were enacted, do not in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property. There is no color for the contention that they rendered the indenture void; nor was it claimed in this Court that they had, in and of themselves, any such effect."

Conclusion.

In conclusion it is respectfully submitted that the judgment of the Court below should be affirmed.

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